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No. 90-6013

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TERM, 1992

ROBERT WAYNE LEE,
Petitioner,

VS.

BAPTIST MEDICAL CENTER OF OKLAHOMA, INC.;
DR. SCOTT CALHOON;
OKLAHOMA HEALTHCARE CORPORATION;
AND BAPTIST MEDICAL PLAZA ASSOCIATES, LTD.,
Respondents.

ON APPEAL FROM THE TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Tenth Circuit Court of Appeals erred in reinterpreting the Restatement (Second) of Torts, thus extending tort law beyond that as now followed in all fifty states and other Circuits, as well as this Court, and creating precedent not only for Oklahoma, but for all states in the Tenth Circuit, and persuasive law in all other circuits, thus violating the constitutionally protected rights of AIDS victims in a physician/patient privilege?

II. Whether Petitioner's fundamentally protected rights of due process and right to travel have been unconstitutionally infringed by the Tenth Circuit, which ignored its own past precedent in holding that even if Petitioner had not waived the physician/patient privilege, the statements made by Respondent doctor were conditionally privileged under tort law?

III. Whether the Tenth Circuit Court of Appeals erred in upholding the District Court's granting of Summary Judgment to Respondent doctor on Petitioner's Section 652 B claim after Petitioner clearly established an issue of fact regarding lack of consent for the administration of an AIDS test given to the Petitioner?

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OPINIONS BELOW

The United States Tenth Circuit Court of Appeals rendered its opinion (No. 90-6013) on November 6, 1991, and denied Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc on January 16, 1992. Said appeal was from an Order and Judgment for the Respondents entered by the Honorable Ralph G. Thompson, United States District Judge for the Western District of Oklahoma on December 12, 1989.

JURISDICTION

The jurisdiction of this Court is invoked under RULE 10 (a) of the RULES OF THE SUPREME COURT OF THE UNITED STATES, for the reason that the decision of the United States Court of Appeals for the Tenth Circuit, in its opinion below (Case No. 90-6013), stands in direct and irreconcilable conflict with prior cases in its own circuit, those of other Circuit Courts and past decisions of this Honorable Court.

Jurisdiction of the Tenth Circuit Court of Appeals was based upon 28, U.S.C. Sec. 1291, providing for appeals for final decisions of the District Courts.

Jurisdiction of the District Court was predicated upon 28 U.S.C. Sec. 1331 and 1332, in that this is an action alleging a violation of Petitioner's constitutional, state statutory, and common law rights of privacy.

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Constitution:

First Amendment of the U.S. Constitution

Fourteenth Amendment of the U.S. Constitution

Statutory:

12 O.S. Sec. 1443.1

76 O.S. Sec. 19B

STATEMENT OF THE CASE

The instant case was decided upon a Motion for Summary Judgment. Accordingly, the Peti-

tioner has set forth below a statement of the case, with reference to the initial record including attached Exhibits and portions of depositions. On May 3, 1987, the Petitioner, Robert Wayne Lee, went to the emergency room of Baptist Hospital in Oklahoma City, Oklahoma. Respondent, Scott Calhoon, M.D., and Scott Calhoon, M.D., Inc. (hereinafter referred to as Respondent Calhoon) was the surgeon on call for Baptist Hospital. Respondent Calhoon diagnosed the Petitioner's condition as appendicitis and obtained a consent form from the Petitioner for an appendectomy only. (Docket Entry #21, Exhibit "A", Docket Entry #33, Exhibit "F"). Contrary to the initial diagnosis and the consent given by the Petitioner, Petitioner awoke from surgery to find that a colostomy had been performed.

Further, blood had been drawn and an HIV test performed (AIDS test) without the Petitioner's knowledge and/or consent. (Docket Entry #126, Exhibit "B"). Although this Exhibit shows the physician to be the Respondent Calhoon requesting the test, there is conflicting testimony and a lack of records requested by the Petitioner to establish the exact date the blood was drawn and who ordered the test. (Docket Entry #152, Exhibit "C" & "D") and (Docket Entry #133, Exhibit "A"). The Petitioner never gave his consent for an AIDS test. Petitioner prior to his admittance into Baptist Hospital had no knowledge of any exposure to the HIV virus. (Docket Entry #126, Exhibit "B").

The Petitioner initially filed a medical-malpractice claim for misdiagnosis against all of

the Respondents captioned in this case on March 1, 1988, in U.S. District Court for the Western District of Oklahoma. The complaint as filed made no reference to AIDS or exposure to the HIV virus due to the fact that Petitioner was not alleging any connection between the alleged medical-malpractice and the condition of being exposed to the HIV virus. In fact, Petitioner would not have been able to evaluate and determine any possible connection prior to filing his complaint on March 1, 1988, since he was denied access to his medical records by the Respondent hospital. Other than the self serving defamatory statements of Respondent made to the press the day he was served, there has never been a judicial determination or evidence from any other doctor that there is any connection whatsoever between the medical-malpractice case and AIDS.

Petitioner's attorney presented to U.S. District Judge Thompson a Motion for Immediate Production of those medical records prior to filing his initial complaint. Upon being advised that Judge Thompson would not enter an Order for Immediate Production of Documents, Petitioner filed the complaint, and a Motion to Produce on March 1, 1988, (Docket 1 & 3). Judge Thompson's Order denying the Motion was filed on March 1, 1988. (Docket 4).

After the filing of the Petitioner's complaint, the Respondent, Scott Calhoon, M.D., voluntarily gave a statement to the *Daily Oklahoman* stating that the Petitioner was a carrier of the AIDS virus. Not only once did he tell the world the Petitioner had "AIDS," but he said it three times

to insure that no one missed the point. This article was published on March 2, 1988. Subsequent to this unauthorized publication of the Petitioner's condition, Petitioner filed a Motion to Amend his complaint on August 30, 1988. (Docket 20) and filed his Amended Complaint on September 28, 1988 (Docket 31). The basis of his amended complaint was invasion of privacy, breach of physician/patient confidentiality and lack of informed consent.

Petitioner was never advised prior to filing the initial suit that his condition of being exposed to the HIV virus was in any way connected to the colostomy. Further, the medical records when finally produced *after the complaint was filed* did not indicate a connection between the colostomy surgery and his condition of being exposed to the HIV virus. The *answers filed by the Respondents* (Docket Entry #6 & #9) *do not allege a connection between the necessity of a colostomy and his condition of being exposed to the AIDS virus.* Further, it was not until the deposition of the Petitioner on October 21, 1988, that Petitioner or his counsel had any idea that there was a connection between the alleged malpractice and the condition of being exposed to the HIV virus at page 252-255.

Respondent Calhoon has never produced an authorization for an AIDS test. The Petitioner requested the deposition of Dr. Orville Rickey and Stanley Hupfield, both associated with the hospital, in order to obtain documents to determine when the test was ordered and who ordered it. The Court by Docket Entry #143 finally allowed the Petitioner to take those depositions

but held that the document production request by the Petitioner exceeded the permissible bounds of discovery and directed the Petitioner to confer with the Respondent Calhoon concerning document production. (Docket Entry #141, Production of Documents, Exhibits of subpoenas duces tecum).

The documents produced by these witnesses did not establish beyond all doubt the name of any doctor responsible for ordering this test or when the test was ordered or produce any documents which would allow Petitioner to apply for further discovery. Three forms, which have been included in the appendix herein, clearly suggest that Dr. Calhoon was the one who ordered the test. The Petitioner was provided less than requested and only what Respondent wanted to provide.

The Petitioner, having been limited in its discovery, was unable to provide further evidence to the Court. The Respondent Calhoon and the former Respondent, Baptist Hospital, have exclusive control of those records. By virtue of this fact and since the Respondent did not produce documentation to exonerate him, it must be concluded that the document establishing the doctor responsible for ordering the test without the Petitioner's consent has been withheld from the Petitioner and cannot be presented to this Court in support of Petitioner's contention for lack of consent. However, Petitioner, by sworn Affidavit, denied giving consent (Docket Entry #133, Exhibit "A") which *raised a question of fact.* Thus, the inference and fact question is that no consent form exists.

On December 1, 1988, (Docket 86) an Order was entered dismissing the medical-malpractice claim against all Respondents and dismissing the amended complaint for invasion of privacy, breach of physician/patient confidentiality and lack of consent as to all Respondents with the exception of Dr. Scott Calhoon and Scott Calhoon, M.D., Inc. Thus, the only remaining Respondents before this Court are Dr. Scott Calhoon and Scott Calhoon, M.D., Inc. and the only claim against these two remaining Respondents is the amended complaint of defamation, invasion of privacy, breach of physician/patient confidentiality and lack of informed consent. *The remaining Respondents and the Petitioner filed Motions for Summary Judgment and Motions for Partial Summary Judgments.* The Court's final Order as to these Motions was entered on December 12, 1989, entering a Summary Judgment in favor of the Respondents, Dr. Scott Calhoon and Scott Calhoon, M.D., Inc. On January 11, 1990, the Petitioner filed a Notice of Appeal.

On November 6, 1991, the Tenth Circuit Court of Appeals handed down its opinion, for publication, affirming the District Court in all respects. (A copy of this Order has been made part of the Appendix herein).

Subsequently, the Petitioner filed a Motion for Rehearing and Suggestion for Rehearing En Banc which was denied by the Tenth Circuit on January 16, 1992. (A copy of said Denial has been made part of the Appendix herein).

ARGUMENT

I. **THE TENTH CIRCUIT COURT OF APPEALS ERRED IN AFFIRMING THE DIS-**

TRICT COURT'S FINDING THAT, BY FILING A MALPRACTICE ACTION AGAINST THE RESPONDENT DOCTOR, THE PETITIONER WAIVED THE PHYSICIAN/PATIENT PRIVILEGE, SUCH THAT THE RESPONDENT WAS ALLOWED TO PROCLAIM TO THE PUBLIC THAT THE PETITIONER "HAD AIDS."

As has been previously stated, the medical-malpractice action was dismissed and the only remaining issue was that in the amended complaint for invasion of privacy, physician/patient confidentiality, and lack of consent. In regard to the physician/patient confidentiality, the District Court ruled on June 27, 1989 (Docket Entry #131) at page 9:

> "*While the Court would concur that disclosure of the confidential medical information that was not relevant* to the medical-malpractice suit *might be actionable,* the disclosures made by the Respondent apparently pertained to his defense of the lawsuit." (Emphasis added.)

the Court in its Order continues at page 10:

> "Therefore, *although the Court does not intend by its decision to vindicate the Respondent's statements or condone his behavior,* he concludes that the Petitioner, by filing his lawsuit, waived the physician-Petitioner privilege to the extent of any communications material to the litigation (either the Petitioner's claims or defenses), thus precluding him from recovering for breach of an implied agreement of confidentiality." (Emphasis added.)

The Tenth Circuit upheld this finding, and Petitioner appeals said conclusion as erroneous

inasmuch as the District Court admitted that there was no evidence presented that the information was relevant to the medical-malpractice action, but only "apparently pertained" to the action and further, Petitioner would direct the Court to District Judge Thompson's statement at page 3 of the opinion filed on June 27, 1989 (Docket Entry #131), wherein the Court stated:

> "It *cannot be disputed that Respondent Calhoon publicly disclosed a personal matter,* and the Court previously concluded in its March 16, 1989, Order that the *statements would be offensive to a reasonable person.* Therefore, the issues to be determined are whether the Respondent's divulgence was of legitimate concern to the public or was privileged." (Emphasis added.)

The Restatement (second) of Torts Sec. 652 D provided in pertinent part that:

> One who gives publicity to a matter concerning the public life of another is subject to liability of the other for invasion of his privacy, if the matter publicized is of a kind that:
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

By the District Court's own admission, the Petitioner had met the standard of 652 D (a) and by the Court's own admission, there was not evidence presented to meet 652 D (b) as a defense in that the Court by its own language said it would only "apparently" pertain to a defense.

On appeal, the Tenth Circuit acknowledged that Oklahoma Courts recognize a right of action for invasion of privacy, if a Petitioner can estab-

lish the public disclosure of a private fact, when such fact is not of "legitimate public concern." *McCormack v. Oklahoma Publishing Co.*, 613 P. 2d 737 (Okla. 1980).

The Tenth Circuit held, however, that the Petitioner had become a public figure by filing the initial medical malpractice claim due to the nature and size of the claim ($38 million). Throughout the Respondent's pleadings at the District Court level and the Tenth Circuit, the $38 million figure is redundantly mentioned to present an image of sympathy for the Respondents and divert the attention of the Court from the real issues. Once and for all, Petitioner respectfully requests that this red herring be put aside and the real issues be appropriately addressed.

The initial prayer for relief totalling $38 million included punitive damages. Punitive damages are designed to gain the attention of a tort feasor and impress upon that tort feasor the errors of his way such that no other person will become a helpless victim at his hands. In light of the fact that Defendant's cumulative gross assets are well in excess of $700 million, a prayer for $38 million including punitive damages is not unreasonable and was not made to sensationalize the Petitioner's case.

Petitioner respectfully submits that the opinion of the Tenth Circuit herein is extending the meaning of Restatement (Second) of Torts, Sec. 652(D)(b), and creates new and unnecessary law. As such, said extension irreconcilably conflicts with all other circuit courts and this Court as to the definition and scope of tort law. If this Court

upholds the Tenth Circuit ruling, all other courts will fall in line with it like soldiers and the meaning of the U.S. Constitution shall have been irrevocably changed by a circuit court by deleting an individual's inalienable right to privacy, dignity and the pursuit of happiness.

Petitioner respectfully points out that this conclusion misses one important point, namely that the "publisher" here is not a member of the press, or anything like it. He is simply a litigant to a lawsuit. A review of the cases cited by the Tenth Circuit as determinative on these matters, as set out in *Gilbert v. Medical Economics*, 665 F. 2d 305, (10th Dir. 1981) indicates that every one of them was involved with the protection of the First Amendment *freedom of the press.*

In *Cox Broadcasting v. Cohn*, 420 U.S. 469, 95 S. Ct. 1029, 43 L.Ed. 328 (1975), the emphasis is on the nature of the press and the service it provides a free society. The conflict in that case is seen as between privacy rights and the rights of the press, specifically:

> ". . . In this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society."

Cox, supra, p. 491

In *Time, Inc. v. Hill*, 385 U.S. 374, 87 S. Ct. 534, 17 L.Ed. 2d 456 (1967), this Court was even more expansive as to the import of the protection of the freedom of the press, but couched its comments specifically in terms of press freedom:

> "In this context, sanctions against either innocent or negligent misstatement would present a grave hazard of discouraging the press from exercising the constitutional guarantees. Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society."

Time, Inc., supra, p. 389

In the case at bar there are simply no such considerations. It is true that the Respondent uttered his phrases to a member of the press, but *there is no legitimate nexus between that fact and the protection of the freedoms of the press as opposed to the rights of privacy in the individual. A finding that Respondent would have to pay for his invasion of Petitioner's privacy will chill no freedoms enjoyed by the press.* There will be no attack on our political system or our open society.

To hold as has been done thus far in this case, however, expands those rights correctly claimed by the press to all those whom they cover. The litigants in every suit will be deemed to say almost anything they want in a case, so long as it is to the press, and reasonably near filing day of some sort of pleading. This results in the particular rule of law set out in 652 as being meaningless, or re-written. Virtually every case found by this writer has involved the *press* with regard to this rule of law. *None relate to the interviewee,* or his rights and privileges during the interview. This Court had never extended this doctrine to

this limit. See also *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245, 95 S. Ct. 465, 42 L.Ed. 419 (1974).

The comments to the Restatement itself draw the battle line as between the rights of the press and those of privacy:

> "It seems clear that the common law restrictions on recovery for publicity given to a matter of proper public interest will now become a part of the constitutional law of freedom of the press and freedom of speech. To the extent that the constitutional definition of a matter that is of legitimate concern to the public is broader than the definition given in any State, the constitutional definition will of course control."

Restatement, Torts Second, Sec. 652 D Comment on Clause (b), Section D

The litany of what is considered news under Section G in the same comment does not include anything resembling the scenario in the case at bar, and in Section H of the same comment it is stated:

> ". . . The line is to be drawn when the publicity ceases to be the giving of information *to which the public is entitled and becomes a morbid and sensational prying into private lives* for its own sake, with which a reasonable member of the public, with decent standards, would say they had no concern. The *limitations,* in other words, *are those of common decency, having due regard to the freedom of the press* and its reasonable leeway to choose what it will tell the public, but also *due regard done to him by the exposure . . .*"

Restatement Torts Second, Sec. 652 D Comment on Clause (b), Section H (Emphasis added.)

The harm that has resulted to the Petitioner as a direct result of the statements made herein is indeed great. The Petitioner has been forced to quit his job, move to a new city and change his name in order to avoid persecution and further embarrassment suffered by himself as well as his family.

The above issue is clearly a question of fact, a question not susceptible to the granting of Summary Judgment, as questions of common decency are among those most apt to provoke a disagreement even among reasonable persons on a jury. To affirm the granting of such judgment on such grounds as to issues when they relate to freedom of the press is dangerous. To do so where the issues do not run to freedom of the press extends unnecessarily the scope and reach of Sec. 652, to no good effect and to a point this Court has never endorsed.

As the Supreme Court of Oklahoma recognized in *Northrip v. Montgomery Ward & Co.*, 49 P. 2d 489 (Okla. 1974):

> "No less an authority than the Supreme Court of the United States has held in the *United States v. Diebold*, 369 U.S. 654, on Summary Judgment the inference drawn on the underlying facts contained in such material must be viewed in the light most favorable to the party opposing the motion."

The Respondent claims, and both lower Courts have held, that by the filing of his initial lawsuit, there was an absolute waiver of privilege to the physician/patient confidentiality

rule. In *Guinn v. Church of Christ of Collinsville*, 775 P. 2d 766 (Okl. 1989). Headnote 6 ESTOPPEL states " 'Waiver' is voluntary or intentional relinquishment of known right."

Referring back to the record, *the complaint* that was filed by the Petitioner on March 1, 1988, *made absolutely no mention of AIDS.* Further, the complaint filed herein alleged that unnecessary surgery and misdiagnosis since the Petitioner had been advised he was being operated on for appendicitis and not a colostomy. Further, the records would show that on March 1, 1988, a Motion to Produce was filed by the Petitioner requesting the medical records due to the fact that the Respondent hospital had refused to provide medical records to the Petitioner or to Petitioner's counsel. Said Motion to Produce was denied by District Judge Thompson on March 1, 1988.

At this point, Petitioner had no idea that there was any connection whatsoever between the unconsented to colostomy and the subsequent discovery of his exposure to the HIV virus. Further, to this date, there is no evidence of any connection. Clearly, had Petitioner known that there was any connection at that time or that there could possibly be any connection, the lawsuit would have been filed under John Doe and appropriate motions and applications for protective orders would have been filed. In the case of *Inhofe v. Wiseman,* 772 P. 2d 389 (Okl. 1989) at 393 the Court stated:

> "Pretrial depositions are not public parts of a civil trial. They were not open to the public at common law and, in general, they are con-

> ducted in private as a matter of modern practice. Much of the information surfacing during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Traditionally, discovered information, not yet admitted, is not a public source of information. Unless otherwise ordered by the Court, depositions are sealed until admitted into evidence.

There is absolutely no evidence in the record that the Petitioner had *knowledge and appreciation* of danger and *"volenti non fit injuria"* by filing a complaint based on medical malpractice in order to give the Respondent the right to tell the world the Petitioner had AIDS.

Being denied access to medical records, he was not able to even determine a remote possibility of a connection between his HIV exposure to an unconsented surgery. It is beyond reasonable expectation that he voluntarily waived any right to privacy by filing the complaint. The disclosure by the Respondent, Dr. Scott Calhoon, to the public in the form of a newspaper release that the Petitioner was an AIDS carrier was a clear violation of the physician/patient confidentiality. The obvious basis for this unauthorized disclosure was malicious and based upon self-interest. *If such were not the case, Respondent's counsel would have raised the issue in his answer in the malpractice action.* The Petitioner would point out that the deposition of the Petitioner, Robert W. Lee, taken on October 21, 1988, at page 252-255 was the first indication that the Petitioner even had that there was any connection between his exposure to the HIV virus and

any alleged medical malpractice case was revealed in an allegation by counsel for Baptist Hospital, Mr. Glenn Huff.

In addition, Petitioner points out that Dr. Calhoon did not report the Petitioner's condition as an AIDS carrier to the Oklahoma State Department of Health as required by law.

A persons' right to privacy concerning his physical condition cannot be cavalierly dismissed. The Court in *Doe v. Coughlin,* 697 F. Supp. 1234, (N.D.N.Y. 1988) stated concerning persons with AIDS which is an inevitably fatal condition in upholding the right of privacy as follows:

> "In the Court's view *there are few matters of a more personal nature and there are few decisions over which a person could have a greater desire to exercise control,* than the manner in which he reveals that diagnosis to others. An *individual's decision to tell family members* as well as the *general community that he is suffering from an incurable disease, particularly one such as AIDS, is clearly an emotional and sensitive one fraught with serious implications for that individual."* (Emphasis added.)

Moreover, in the case of *Woods v. White,* 689 Fed. Supp. 874 at page 876 (W.D. Wis. 1988), a Court recognized that:

> "Given the most publicized aspect of the AIDS disease, namely that it is related more closely than most diseases to sexual activity and intravenous drug use, *it is difficult to argue that information about this disease is not information of the most personal kind,* or that an individual would not have an interest in protecting against the dissemination of such

information. See Note, The Constitutional Rights of AIDS Carriers, 99 Harv. L. Rev. 1274, 1287-1288 (1986) (noting possible serious consequences of mandatory AIDS testing, including possibility that public reporting requirements may discourage some individuals from seeking tests.)

It is for the reasons stated herein that the Petitioner respectfully submits that the Summary Judgment granted for the Respondent doctor by the District Court, and affirmed by the Tenth Circuit, must be reversed and remanded and that the facts herein be presented to a trier of fact.

II. **THE TENTH CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT'S FINDING THAT EVEN IF THE PETITIONER HAD NOT WAIVED THE PHYSICIAN/PATIENT PRIVILEGE, THE STATEMENTS MADE BY THE RESPONDENT DOCTOR WERE CONDITIONALLY PRIVILEGED AND COULD NOT BE A BASIS FOR INVADING THE PETITIONER'S RIGHT TO PRIVACY UNDER SECTION 652 B OF THE RESTATEMENT (SECOND) OF TORTS.**

Title 76 O.S. Sec. 19B provides as follows:

"In cases involving a claim for personal injury or death against a practitioner of the healing arts or a licensed hospital, arising out of patient care, where any person has placed his physical or mental condition in issue by the commencement of any action, proceeding or suit for damages, or where any person has placed in issue the physical or mental condition of any other persona or deceased person

> by or through whom such person rightfully claims, he shall be deemed to waive any privilege granted by law concerning any communication made to a physician or health care provider with reference to any physical or mental condition or any knowledge obtained by such physician or health care provider by personal examination of any such patient; *provided that, before any such communication, medical or hospital record or testimony is admitted in evidence in any proceeding it must be material and relevant to an issue therein, according to existing rules of evidence.* (Emphasis added.)

It is clear in the language that the purpose of this statute was to allow doctors and hospitals involved in lawsuits to obtain complete medical records of a Petitioner in order to evaluate the physical condition of that Petitioner in relation to the alleged claims. It is obvious from the language underlined above that this intent of the legislature was that information obtained in order to evaluate the physical condition of the Petitioner in relation to a particular claim not be open to public view unless it was, "material and relevant to an issue therein." Respondent Calhoon attempts to interpret the statute to allow him to expose whatever information he may have in his files to the entire public. It is obvious that the intent of this statute was to aid in discovery, but yet to protect any Petitioner from unnecessary disclosure.

The irony in this present case is that the Respondent Calhoon is attempting to hide behind a discovery statute of the State of Oklahoma when, in fact, he had those records in his own

possession. They were his own records and he disclosed them to the public *one* day after the Petitioner filed a lawsuit on the basis of medical-malpractice unrelated to his condition of being exposed to the HIV virus.

The District Court and Tenth Circuit held that Dr. Calhoon's statements to the press were conditionally privileged under Restatement (second) of Torts Sec. 594, which provides that:

> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> (a) there is information that affects a sufficiently important interest of the publisher, and
>
> (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

The principle set out in Sec. 594 simply means that one whose reputation is under attack has the right to defend himself:

> A conditional privilege exists ... when the person making the publication reasonably believes that his interest in his own reputation has been unlawfully invaded by another person and that the defamatory matter that he publishes about the other is reasonably necessary to defend himself. The privilege here is analogous to that of self-defense against battery, assault or false imprisonment ... Thus the defendant may publish in an appropriate manner anything that he reasonably believes to be necessary to defend his own reputation against the defamation of another ... (Comment K, Sec. 594)

Title 12 O.S. 1443.1 was interpreted by the Tenth Circuit as supporting the above finding. In part, the statute provides that expressions of opinion in regard to judicial proceedings are not actionable as libel, since they are "privileged communications."

In making this ruling, the Tenth Circuit ignored its own precedent established in *Klier Advertising v. Premier Pontiac*, 921 F. 2d 1036 (10th Cir. 1990). It should be noted that the *Klier* case was not decided until after briefs were filed by both Petitioner and Dr. Calhoon. For this reason, neither party was able to address or brief this case for the Court's consideration.

In *Klier*, the Tenth Circuit held that statements by a party litigant about his lawsuit were not privileged under 12 O.S. Sec. 1443.1. The party in that case had said some allegedly libelous remarks in commenting on a lawsuit filed against him. They were quoted by the *Tulsa World*, and when his legal opponent sought relief, this Court said:

> "Regarding privilege, even a cursory reading of section 1443.1 shows that its legislative purpose is to protect First Amendment rights attached to all *official* reporting of any legislative or judicial proceedings . . .
>
> There *can be no serious argument that Bill Stokely's comments to the press amounted to 'official reporting' even if, as the trial court pointed out, the statements merely reflected Stokely, Inc.'s affirmative defenses set out in pleadings that were public record."*

Klier, supra, at p. 1043 (Emphasis added.)

In the case at bar the Court, in its opinion on page 10, asserts just the opposite, that ". . . expressions of opinion in regard to judicial proceedings are not actionable as libel . . ." and then sets out verbatim Sec. 1443.1.

Appellant asserts that the prior holding of the Court in *Klier* is the appropriate one, since it is apparent from the words used in the statute that the communication the legislature had in mind was that of the press in commenting on a trial or other proceeding, and not the offhand remarks, often inflammatory and meant to be so, from the litigants. This appears to be a further codification of the First Amendment rights, as set out by the *Klier* Court, and may be instructive as well in the inquiry as to the rest of the issues presented herein.

This is also consistent with recent Oklahoma case law as discussed by the *Klier* court. In *Kirschstein v. Hayes,* 788 P. 2d 941, (Okla. 1990) the Oklahoma Supreme Court stated that the inquiry as to this aspect of Sec. 1443.1 turns to a large extent on the determination of to whom the publication is made. In *Kirschstein,* the publication via the media to the public, unrelated to the actual judicial process, was enough to render the statements unprivileged.

As in *Klier,* it is difficult to see how the statements made by Dr. Calhoon can, in the Court's eyes, amount to "official reporting." The facts, as previously mentioned, clearly demonstrate that those *statements were not even provided in the Respondent's answer,* filed subsequent to the date of the statements.

So it is with the case at bar. The filing of a suit in and of itself does not render statements made the next day sufficiently connected to warrant the privilege under Sec. 1443.1, because the declarant in *Klier* made his statements the next day in response to a reporter asking his impressions of the suit. *With the same facts in the case herein, the result must be the same, the difference spelled out, or precedent suffer.*

Public policy also suggests a conclusion different and necessary from that reached by the Tenth Circuit. All across the country, the peers of the Respondent physician are consistently fighting the required disclosure by some of them that they themselves have tested positive for Human Immuno-deficiency Virus. They do so on grounds of privacy. *Leckelt v. Board of Commissioners of Hospital District No. 1* 714 F. Supp. 1377, affirmed 909 F. 2d 820 (5th Cir 1990), *Glover v. Eastern Nebraska Community Office of Retardation,* 867 F. 2d 461 (1989), *Estate of Behringer v. Medical Center at Princeton,* 2409 N.J. Super. 597, 592 A. 2d 1251 (1991). Yet, in the case at bar, the physician has seen fit to publicize the same information about Petitioner, arguing that it is "legitimate concern to the public."

This contradiction, as adopted in essence under the current opinion of the Tenth Circuit, will cement in place a double standard. Physicians need not disclose to patients or potential patients their risk of contracting AIDS, but should a patient sue for malpractice, his blood results are fair game for the public and the media. This is likewise the logical result of the line of reasoning in the current opinion concern-

ing the waiver of physician patient privilege upon filing suit. It is patently clear from the privilege statute cited by the Court that the privilege waiver intended in 76 O.S. Sec. 19 has to do with the introduction of the information in question as evidence in the trial. The evil obviously sought to be addressed by the legislature was the claiming of privilege during suit, so as to hamper a physician's defense when under malpractice attack. To stretch such intent over to allowing the physician to use it offensively, to discourage suits before they begin, is not reasonably to be considered to have been within the legislature intent.

The creation of this set of circumstances is not one which will serve justice well. If physicians' privacy is invaded by divulging their HIV blood test results, so is that of Petitioner herein. This jurisdiction should not take the lead in promoting such a double standard.

Finally, as aforementioned, Petitioner has suffered severe harm. He has been forced to relocate, give up his job and assume a new name. His constitutionally protected right to life and right to travel have been infringed, as he must now live as a second-class citizen.

For these reasons, as well as those stated by Petitioner in his previous argument, Petitioner respectfully requests that the Summary Judgment granted and upheld in this case be reversed and remanded and presented to a trier of fact.

III. **THE TENTH CIRCUIT ERRED IN UPHOLDING THE DISTRICT COURT'S GRANTING OF A SUMMARY JUDG-**

MENT TO THE RESPONDENT DOCTOR AFTER PETITIONER CLEARLY ESTABLISHED AN ISSUE OF FACT REGARDING LACK OF CONSENT FOR THE ADMINISTRATION OF AN AIDS TEST GIVEN TO PETITIONER.

As previously mentioned, the Petitioner, Robert Wayne Lee, never consented to being tested for AIDS and was denied access to his medical records.

Despite this fact, the Tenth Circuit upheld the District Court's conclusion that there was sufficient "evidence" submitted by Dr. Calhoon to the effect that the doctor did not order or authorize an AIDS test of the Petitioner.

The only "evidence" submitted by Dr. Calhoon was a self-serving affidavit of Dr. Calhoon himself stating the above. Yet the only HIV tests that were supplied to Petitioner clearly suggest that not only was Dr. Calhoon the Petitioner's treating physician, but that he was the one responsible for ordering the tests. (See Appendix).

At a minimum, this creates a genuine issue of material fact that should be presented to a jury.

It should be noted, however, that the Petitioner was denied access to most, if not all, medical records from his initial date of treatment.

Moreover, the Petitioner certainly did not consent to the release of the information derived from the tests.

Furthermore, the doctrine of "informed consent," as adopted in Oklahoma, appears to have been breached, based upon the facts of this case.

"The doctrine imposes a duty on a physician to inform a patient of his options and their attendant risks. If a physician breaches this duty, patient's consent is defective, and physician is responsible for the consequences."

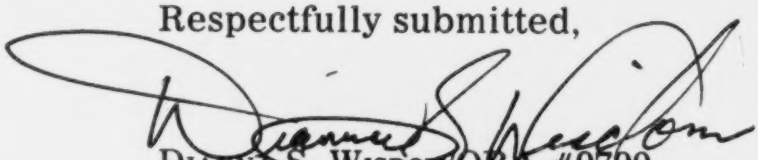
Dr. Calhoon, the Petitioner's treating physician, never did personally inform Robert Lee that he had tested positive for AIDS. In a medical-malpractice action which raises the question of informed consent where the Petitioner testifies there was no consent given, the issue must be resolved by examining the credibility of the Plaintiff's testimony. The credibility of the witness is not within the province of the trial court but must be submitted to the jury. *Smith v. Karen S. Reisig, M.D., supra,* at 286. It is clear from the record that there is a question of fact concerning informed consent. In the case of *Rea v. Wichita Morg. Corp.*, 747 F. 2d 567 (10th Cir. 1984) at 568 the Court held that the burden is on the moving party to show the absence of a genuine issue of a material fact, and the pleadings and other documentary evidence must be construed in favor of the opposing party.

CONCLUSION

This is not justice and without justice we are nothing. Petitioner Robert Wayne Lee respectfully requests this Court to reverse and remand this cause to the District Court for the Western District of Oklahoma so that the issues presented herein may be properly submitted to a jury which is the only appropriate forum where a genuine question of fact must be decided. One lonely, frightened man came to the halls of justice, filed a complaint and was unmercifully

crucified without any explanation of "why." This is not the way it is supposed to happen, and if it is justice does not exist except for the rich and influential.

Respectfully submitted,



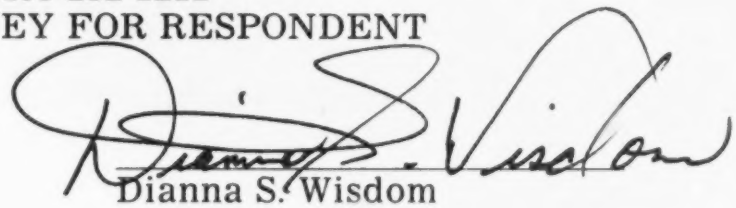
DIANNA S. WISDOM, OBA #9790
3120 Northwest 23rd Street
Oklahoma City, Oklahoma 73107
(405) 528-1888

Attorney for Petitioner

CERTIFICATE OF SERVICE

This certifies that on the 14th day of April, 1992, a true and correct copy of the above and foregoing instrument was mailed, postage prepaid, via U.S. Mail, to the following:

Mr. George W. Paull/OBA# 6977
Short, Barnes, Wiggins, Margo & Adler
1400 American First Tower
Oklahoma City, OK 73102
Phone # 405-232-1211
ATTORNEY FOR RESPONDENT



Dianna S. Wisdom

APPENDIX A

Lawsuit Claims Unneeded Surgery

By Wayne Singleterry
Staff Writer

Robert Wayne Lee says he went to the Baptist Medical Center's emergency room suffering from a pain in the side and was diagnosed as needing an appendectomy.

But when he came out of surgery, he says he discovered that Dr. Scott Calhoon had performed an intestinal bypass, known as a colostomy, according to a malpractice suit filed in federal court here.

The Orange County, Fla., man has sued Calhoon and Baptist Medical Center, seeking $38 million. Lee says he went to Baptist while visiting Oklahoma City last May.

Calhoon said Tuesday that Lee needed emergency surgery because he had a perforated colon and was infected with the acquired immune deficiency syndrome virus.

"He was seen in the emergency room and thought to have appendicitis," Calhoon said.

"This was before we identified that he was a carrier of the AIDS virus. He needed emergency surgery and at that time a perforated colon was identified.

"Life-saving surgery was performed, which was a temporary colostomy. He had a preoperative diagnosis of appendicitis because he gave us no history of being an AIDS carrier.

"If we had known of his AIDS exposure, other more esoteric types of infections, which are common in immuno-compromised hosts, would have been considered," Calhoon said.

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-88-354-T

ROBERT WAYNE LEE,
Plaintiff,

-vs-

BAPTIST MEDICAL CENTER OF OKLAHOMA, INC.;
DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION;
AND BAPTIST MEDICAL PLAZA ASSOCIATES, LTD.,
Defendants.

Deposition of Robert Wayne Lee
Taken on October 21, 1988
On Behalf of the Defendants
at Oklahoma City, Oklahoma

APPEARANCES:

MS. DIANNA S. WISDOM and MR. PAT LaMOURE, Attorneys at Law, 4401 N. Classen, Suite 200, Oklahoma City, Oklahoma 73118, appearing on behalf of the Robert Wayne Lee.

MR. GEORGE W. PAULL, of the firm of Short, Barnes, Wiggins, Margo & Adler, Attorneys at Law, 1400 American First Tower, Oklahoma City, Oklahoma 73102, appearing on behalf of Dr. Calhoon.

MR. GLENN HUFF and MS. SUSAN SHORT, of the firm of Foliart, Huff, Ottaway & Caldwell, 20th Floor, First National Center, Oklahoma City, Oklahoma 73102, appearing on behalf of Baptist Medical Center.

REPORTED BY:
Ms. Pamela J. Booker,
Oklahoma Notary and
Shorthand Reporter

CERTIFICATE

STATE OF OKLAHOMA)
)
COUNTY OF OKLAHOMA)

I, Pamela J. Booker, Oklahoma Notary and Shorthand Reporter for the State of Oklahoma, certify that Robert Wayne Lee was by me sworn to testify the truth; that the deposition was taken by me in stenotype and thereafter transcribed and is a true and correct transcript of the testimony of the witness; that the deposition was taken on October 21, 1988, in Oklahoma City, Oklahoma; that I am not an attorney for or a relative of either party, or otherwise interested in this action.

Witness my hand and seal of office on this 24th day of October, 1988.

_____

Pamela J. Booker,
Oklahoma Notary and
Shorthand Reporter

Q. Can I highlight it for you here?

A. You sure may.

Q. Okay. I'm going to highlight, "monogamous times six months."

A. Six months, yes.

Q. Had you been monogamous for six months?

A. I hadn't done anything for six months. That's what I was questioning. That, monogamous to me is like you were living with someone for six months, I would take it to mean that.

(Short interruption)

MR. HUFF: Counsel, I know in discovery disputes, there's a requirement of the 14B conference, can we say that this suffices for the 14B conference that we have a bona fide dispute as to discovery or the discoverability of your client's homosexual activities and the identity of –

MS. WISDOM: Yes.

MR. HUFF: – people that have been involved in that?

MS. WISDOM: In that same regard, the question concerning release of information from his personnel file, which I presume you probably would want to present at the same time, I would say that we have had our 14B conference, and also in that regard, I would advise that since, as Mr. Lee has stated, none of his friends, relative, or employers, or co-workers, he has ever directly told that he has AIDS, and I realize that during the deposition, there were a lot of names of friends, relatives, co-workers, et cetera. We would also like the opportunity to present, possibly at the same time, an application for a protective order to Judge Thompson concerning that, in that it is our feeling that he has not waived any physician, patient privilege, or any rights thereunder by filing

the lawsuit, and that if you were to contact these people prior to us getting a ruling from the judge as to the protective order, we feel that that would be a direct damage to him if, in fact, he does have that privilege, and that that information that he may or may not have tested HIV positive was ever made known to anyone other than a doctor that he directly told, or anyone that he may have directly told.

So if we may have that understanding, we would like to present an application for a protective order to the judge at the same time, and we can get both of those taken care of, and however he rules, possibly take it up at our next deposition.

MR. HUFF: It's our position that the medical condition that Dr. Calhoon treated is the direct result of Mr. Lee's being an AIDS carrier and having the AIDS virus and that is the reason, one of the reasons for the condition that has been treated by Dr. Calhoon. I think they're inextricably intertwined, and cannot be separated.

I certainly recognize your right to fight for a protective order, but it would be our position in that regard that our defense in this case is going to necessitate exploring in some detail the medical condition that his being an AIDS carrier that resulted in this condition that necessitated the surgery.

And as well, since it is a defamation action, and as you're well aware, the suit in which it is being alleged that his reputation has been damaged, I think opens his reputation to scrutiny from all angles, and we have every right to get into that.

And, now, I do not want to unnecessarily advertise the fact that he is an AIDS carrier, but on the other hand I cannot agree to be unduly restricted in contacting witnesses and talking to witnesses about Mr. Lee, about his reputation, about any potential

damage to his reputation, and in fact, we feel if there is any damage to his reputation that it is due to the filing of the lawsuit more than anything else.

I don't know that we're doing anything more than just arguing back and forth. I cannot agree to be bound by any restraint upon who we might contact.

MS. WISDOM: Okay. I understand that. I'm simply asking, or simply stating our position in asking that we be allowed to present that issue to Judge Thompson, and in that regard —

MR. HUFF: That's fine with me.

MS. WISDOM: This is the first time I've ever heard that it was alleged that the AIDS was connected to his condition, in which case I understand what you're saying in terms of relevancy.

MR. HUFF: Now that we've made all these records — in view of all this, it's my understanding that at this time we are recessing the deposition of the Plaintiff, and it is to be reset at a later date, either by agreement, if no agreement, to be reached by notice, but to allow parties and their counsel in the meantime to pursue the appropriate motions, discovery motions of the court.

(Short interruption)

MR. PAULL: Mr. Lee, under the rules of the court, you have the right to read and review this transcript that will be printed in transcript form. To reserve that right, you need to inform this lady to your right, or you may waive that right in which case I'm sure your counsel will provide you with a copy.

Counsel, due to this late date, I would

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-88-354-T

ROBERT WAYNE LEE,
Plaintiff,

vs.

BAPTIST MEDICAL CENTER OF OKLAHOMA, INC.; DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; AND BAPTIST MEDICAL PLAZA ASSOCIATES, LTD.,
Defendants.

[Filed December 12, 1989]

JUDGMENT

In accordance with the orders entered these dates, December 12, 1989, July 24, 1989 and June 27, 1989, judgment is entered in favor of the defendant Dr. Scott Calhoon and against the plaintiff Robert Wayne Lee.

IT IS SO ORDERED this 12th day of December, 1989.

UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET
ON 12-12-89

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-88-354-T

ROBERT WAYNE LEE,
Plaintiff,

vs.

BAPTIST MEDICAL CENTER OF OKLAHOMA, INC.; DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; AND BAPTIST MEDICAL PLAZA ASSOCIATES, LTD.,
Defendants.

[Filed December 12, 1989]

ORDER

Plaintiff Robert Wayne Lee instituted this action against Dr. Scott Calhoon seeking to recover for alleged medical negligence arising out of emergency surgery performed on the plaintiff. The plaintiff subsequently amended his complaint to add claims for defamation, invasion of privacy and breach of an implied agreement of confidentiality. Both parties filed motions for summary judgment and summary judgment was granted in favor of defendant Calhoon on the defamation claim, the plaintiff's invasion of privacy claim under § 652D of the Restatement (Second) of Torts and his claim for breach of an implied agreement of confidentiality. With respect to the plaintiff's invasion of privacy claim premised on § 652B of the Restatement (Second) of Torts (intrusion upon seclusion), the plaintiff was directed to explain the significance of plaintiff's exhibit "B" and submit any other evidence to support his claim that defendant Calhoon ordered the AIDS test.

The plaintiff has filed his supplemental response and, in addition to failing to explain his exhibit "B", has failed to submit sufficient proof to controvert the evidence submitted by the defendant that he did not

order or authorize either of the two AIDS tests. To the contrary, the only credible evidence establishes that the initial test was ordered by Dr. Crook and the subsequent test was automatically requested by Baptist Medical Center's blood bank due to the results of the HTLV-III test.

Accordingly, Dr. Scott Calhoon's motion for summary judgment on the plaintiff's § 652B claim is granted.

IT IS SO ORDERED this 12th day of December, 1989.

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-6013

ROBERT WAYNE LEE,
Plaintiff-Appellant,

vs.

DR. SCOTT CALHOUN,
Defendant-Appellee,

SCOTT W. CALHOUN, M.D., INC.,
Defendant.

[Filed November 6, 1991]

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. Civ. 88-354-T)

Dianna S. Wisdom, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

George W. Paull, Jr., (George F. Short and Cynthia L. Sparling, Oklahoma City, Oklahoma; of counsel, Short, Barnes, Wiggins, Margo & Adler, with him on the brief) for Defendant-Appellee Scott Calhoon, M.D.

Before MOORE AND EBEL, Circuit Judges, and BROWN,* Senior District Judge

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BROWN, Senior District Judge.

---

* Honorable Wesley E. Brown, United States Senior District Judge, District of Kansas, sitting by designation

Plaintiff Robert Wayne Lee filed suit for medical malpractice. The claim arose from emergency surgery performed upon plaintiff to repair a perforated bowel. When the suit was filed, a reporter approached the defendant Dr. Calhoon.[1] The doctor explained that plaintiff's medical condition, requiring emergency surgery, was a consequence of patients who are AIDS carriers. This explanation appeared in a news item published in *The Daily Oklahoman.*

The facts are not in dispute. Plaintiff went to the emergency room of Baptist Hospital on May 3, 1987. He was examined by Dr. Crook and Dr. Camp, who diagnosed "possible acute appendicitis," and defendant Dr. Calhoon was called in for an evaluation. (Record Vol. II, Item 152.) Dr. Crook and Dr. Camp are not defendants in this action. Plaintiff signed a consent form for an appendectomy. Dr. Calhoon operated on the plaintiff. The surgery revealed that he suffered from a perforated bowel rather than appendicitis. Dr. Calhoon therefore performed a colostomy. A blood test subsequently revealed that plaintiff had tested positive for AIDS (the "HIV" virus).

Plaintiff then filed suit claiming Calhoon had misdiagnosed his condition and failed to obtain his consent for the unnecessary surgical procedure which was performed. Plaintiff's complaint, filed March 1, 1988, sought $38 million damages. The interview with the reporter took place on March 2, the day after the lawsuit was filed. The news item which appeared in the Daily Oklahoman was as follows:

> Calhoon said Tuesday that Lee needed emergency surgery because he had a perforated colon and was infected with the acquired immune deficiency syndrome virus.

---

[1] "Calhoon" is the correct spelling of the defendant's surname.

> "He was seen in the emergency room and thought to have appendicitis," Calhoon said.
>
> "This was before we identified that he was a carrier of the AIDS virus. He needed emergency surgery and at that time a perforated colon was identified.
>
> "Life-saving surgery was performed, which was a temporary colostomy. He had a preoperative diagnosis of appendicitis because he gave us no history of being an AIDS carrier.
>
> "If we had known of his AIDS exposure, other more esoteric types of infections, which are common in immuno-compromised hosts, would have been considered," Calhoon said.

After this story appeared in the paper, plaintiff amended his complaint to include defamation, invasion of privacy, and breach of doctor/patient confidentiality.

The malpractice claim was dismissed,[2] and summary judgments were entered in favor of defendant Calhoon upon findings that plaintiff had waived his physician-patient privilege, and that plaintiff had failed to establish his right to proceed on his claims of defamation, invasion of privacy, and "intrusion upon seclusion."

In this appeal plaintiff contends that the district court erred in finding that plaintiff had waived the physician/patient privilege, and had further erred in finding that Dr. Calhoon's statements were conditionally privileged and did not violate plaintiff's privacy under Restatement (Second) of Torts § 652B. Plaintiff

---

[2] Plaintiff moved to dismiss with prejudice all of the defendants in this action with regard to his medical malpractice claims and to dismiss without prejudice the defendants Baptist Medical Center of Oklahoma, Oklahoma Healthcare and Baptist Medical Plaza Associates with regard to his invasion of privacy and disclosure of private information claims, reserving these claims only as to Dr. Calhoon. Record, Vol I, Item 86.

further contends that the trial court unduly limited discovery, and that disputed factual issues, and lack of consent for administering the AIDS test precluded dismissal of his claims by summary judgment.

Following our review of the record, we find no error and affirm the judgment.

The trial court entered a number of orders on cross motions for summary judgment before reaching a final judgment in this case, and it is necessary to discuss these in some detail.

By an order of March 3, 1989, the court dismissed plaintiff's claims of defamation, invasion of privacy and breach of confidentiality against Baptist Medical Center, Oklahoma Health Care & Baptist Medical Plaza Associated (Record Vol. I, Docket No. 119); and by order of March 16, (Docket No. 124), the court found that plaintiff failed to state a claim against these defendants, and their motion to dismiss was granted.

Additional orders were entered on March 16, (Record Vol. II, Docket Nos. 122, 123, 124). The court found that Dr. Calhoon was entitled to summary judgment on the plaintiff's defamation claim because his statement regarding plaintiff's status as an AIDS carrier was true. The court denied both parties' motions for summary judgment on other claims. The parties were directed to supplement the record with reference to plaintiff's claims for invasion of privacy as set out under Restatement (Second) of Torts § 652A. Thus, one who invades the privacy of another is liable for resulting harm when there is an "unreasonable intrusion upon the seclusion of another" (§ 652B), or "appropriation of the other's name or likeness" (§ 652C), or "publicity that unreasonably places the other in a false light before the public" (§ 652E).

Plaintiff's claim of "intrusion upon seclusion" is based on provisions of § 652B:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Section 652B liability does not require publication of private matters. The invasion may consist of forced entry into a person's home, eavesdropping or spying upon a person's private affairs, or tampering with a person's private papers or mail.

Plaintiff's "invasion of privacy" claim is based upon § 652D which provides in pertinent part that:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

Liability under this section is based upon publicity given to true statements of fact. "There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public." Comment b, § 652D.

In *McCormack v. Oklahoma Publishing Co.*, 613 P. 2d 737 (Okl. 1980), the Oklahoma court recognized a right of action for invasion of privacy, if a plaintiff

could establish the public disclosure of a private fact, when such fact was not of "legitimate public concern."[3]

The district court correctly found that plaintiff became a public figure by filing his lawsuit, since the size of his claim — $38 million — and the nature of the claim — malpractice, had attracted the attention of the news media. As the court noted, these matters are of legitimate public concern "because of the public interest or debate regarding the size of litigation claims and jury awards . . . and the public concern in policing failures in the medical profession." In *Gilbert v. Medical Economics Company,* 665 F. 2d 305 (10th Cir. 1981), the defendant published an article discussing the personal and professional problems of a physician involved in two incidents of alleged malpractice. This court affirmed the grant of summary judgment to the publisher, recognizing that the article was of legitimate public interest, since it involved the competency of licensed professionals. We there noted that the publication of plaintiff's psychiatric and marital problems were "substantially relevant to the newsworthy topic," through "the rational inference that plaintiff's personal problems were the underlying cause of the acts of alleged malpractice." *Gilbert v. Medical Economics Co. supra,* 665 F. 2d at 308-309.

With respect to the question of whether the doctor's comments pertained to his defense of the law-

---

[3] In *McCormack* a news story related that plaintiff, "a one-time gambler and illegal casino operator in Oklahoma City," had connections with the Mafia and organized crime. Plaintiff claimed that the events mentioned occurred more than twenty years before, and that the publication invaded his right of privacy. While recognizing the tort of invasion of privacy, the court found that plaintiff made no allegation that the facts were private and not of public record, and did not allege that the facts were not of legitimate public concern. Dismissal of the case was affirmed upon the finding that there could be no liability for publicizing facts which were matters of public record.

suit, the court ordered Dr. Calhoon to provide evidence of this fact within five days of the order. On June 30, Dr. Calhoon supplied an affidavit establishing this connection (Record Vol II, Item 132):

> I affirmatively state that the statement made by me in response to questions by the newspaper reporter, and as printed in the newspaper article at issue in this case, were simply expressions of the facts and issues relevant to my defense in this multi-million dollar lawsuit about which I was being questioned. Mr. Lee's original lawsuit alleged that I did not advise him prior to the surgery that he might have a perforated bowel and require a colostomy. In my defense, had Mr. Lee advised me or had I known prior to surgery that Mr. Lee was an AIDS virus carrier, I would have been alerted to a higher probability that he might have a perforated bowel due to more esoteric types of infections which are common with immuno-compromised patients such as Mr. Lee, and I would have so informed him.

In this case, Dr. Calhoon's comments clearly pertained to his defense of the lawsuit, and, as found by the trial court, "were sufficiently related to the news story to preclude them from serving as the basis for an invasion of privacy claim."

The district court also found that defendant Calhoon was entitled to summary judgment on plaintiff's § 652 invasion of privacy claim because even if the plaintiff had not become an involuntary public figure, with a lawsuit which was a matter of public interest, Dr. Calhoon's statements were conditionally privileged under § 594. The elements of conditional privilege as set out in § 593 provide that one who publishes defamatory material is not liable if "the matter is published upon an occasion that makes it conditionally privileged, and the privilege is not

abused." The trial court correctly found that the defendant did not abuse the conditional privilege. Section 594 of the Restatement provides that:

> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> (a) there is information that affects a sufficiently important interest of the publisher, and
>
> (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

The principle set out in § 594 simply means that one whose reputation is under attack has the right to defend himself:

> A conditional privilege exists . . . when the person making the publication reasonably believes that his interest in his own reputation has been unlawfully invaded by another person and that the defamatory matter that he publishes about the other is reasonably necessary to defend himself. The privilege here is analogous to that of self-defense against battery, assault or false imprisonment . . . Thus the defendant may publish in an appropriate manner anything that he reasonably believes to be necessary to defend his own reputation against the defamation of another . . . (Comment k, § 594)

The occasion upon which Dr. Calhoon made his statement and explanation, in response to the reporter's inquiry into the circumstances of the lawsuit, was clearly an instance in which Dr. Calhoon was entitled to provide information that affected his important interest in his own reputation as a medical provider. Plaintiff failed to provide any evidence that defendant abused his conditional privilege, and under such circumstance, the trial court properly entered summary judgment in favor of defendant upon the § 652 invasion of privacy claim.

As to plaintiff's claim for breach of an "implied agreement of confidentiality," the district court found that plaintiff had waived the physician-patient privilege under 76 Okl. Stat. § 19, which provides in pertinent part that:

> In cases involving a claim for personal injury or death against any practitioner of the healing arts or a licensed hospital, arising out of patient care, where any person has placed his physical or mental condition in issue by the commencement of any action, proceeding or suit for damages, . . . *he shall be deemed to waive any privilege* granted by law concerning *any* communication made to a physician or health care provider . . . or *any* knowledge obtained by such physician or health care provider by personal examination of any such patient; provided that, before any such communication, medical or hospital record or testimony is admitted in evidence in any proceeding it must be material and relevant to an issue therein according to existing rules of evidence. (Emphasis supplied.)

It is clear that Dr. Calhoon's comments were entirely relevant to the medical malpractice action in question, and the information he gave was the subject matter of his defense to plaintiff's allegation of malpractice. Indeed, his explanation of the cause and need for emergency surgery entirely justified the dismissal of all malpractice claims. Here the Oklahoma statute is very plain, and all inclusive — it covered "any privilege," and "any communication," with reference to "any physical or mental condition." Under Oklahoma law the language of the statute must prevail. In *Cave Springs Public School District I. 30.* 613 P. 2d 1046 (Okl. 1980), the rule was stated in this manner:

> Where the language of a statute is plain and unambiguous, and its meaning clear and no occasion exists for the application of rules of construction, the statute will be accorded the meaning as expressed by the language therein employed.

Further support for the finding of a waiver of the physician-patient privilege is found in the trial court's reference to 12 O.S. § 1443.1, which provides that expressions of opinion in regard to judicial proceedings are not actionable as libel:

> 1443.1. Privileged communication defined — Exemption from libel
>
> A. A privileged publication or communication is one made:
>
> First. In any legislative or judicial proceeding or any other proceeding authorized by law;
>
> Second. In the proper discharge of an official duty;
>
> Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized.
>
> B. No publication which under this section would be privileged shall be punishable as libel.

The trial court properly ruled that plaintiff waived the physician-patient privilege, and the entry of summary judgment in favor of defendant upon the claim of breach of the implied warranty of confidentiality was appropriate.

With respect to plaintiff's "invasion of privacy" claim, (§ 652B, *supra,* intrusion upon seclusion) which was based upon the allegation that blood had been drawn for the AIDS test without his permission, the court permitted the parties to submit additional information concerning the matter.

On July 24, 1989, the court allowed plaintiff time to conduct additional discovery "limited to the ques-

tion of whether defendant Calhoon ordered the AIDS tests or knew that they had been ordered and approved or ratified such," (Record Vol. II, Item 135).

On October 11, 1989, the court entered an order and final judgment granting defendant Calhoon summary judgment on plaintiff's remaining claim for invasion of privacy under § 652B because plaintiff failed to provide evidence to support such claim. Record Vol. II, Items 144, 145. On plaintiff's motion, the order and judgment were vacated and plaintiff was granted additional time until December 4 to conduct any further discovery necessary to establish his invasion of privacy claim. Record Vol. II, Item 149, Order of November 1, 1989. After reviewing all of the evidence presented by the parties on the issue, the court determined that plaintiff had failed to submit sufficient proof to controvert the evidence submitted by Dr. Calhoon which was to the effect that he did not order or authorize AIDS tests on the occasion in question. In accordance with these findings, judgment was again entered in favor of defendant, Dr. Calhoon. (Order and Judgment of December 12, 1989, Record Vol. II, Items 156, 157.)

In sworn statements, Dr. Calhoon denied that he ordered tests to determine plaintiff's AIDS status. (Vol. II, Item 128, Exhibits "A," "B"). Dr. Calhoon first learned that plaintiff was HIV positive on May 5, two days following the operation.

Plaintiff's argument that the tests were ordered by Dr. Calhoon is pure speculation and contrary to the evidence presented to the trial court. In lab reports submitted by plaintiff himself, several other doctors are noted as requesting tests — i.e., Doctors Gilcher, Crook, Camp, and "Non-Staff M.D." (Record Vol. II, Exhibits to Item 133.)

On the basis of affidavits and depositions presented on the issue the trial court made these findings:

> The plaintiff has filed his supplemental response and, in addition to failing to explain his exhibit "B," has failed to submit sufficient proof to controvert the evidence submitted by the defendant that he did not order or authorize either of the two AIDS tests. To the contrary, the only credible evidence establishes that the initial test was ordered by Dr. Crook and the subsequent test was automatically required by the Baptist Medical Center's blood bank due to the results of the HTLV-III test.[4]

Plaintiff failed to submit any evidence to controvert defendant's evidence that Dr. Calhoon was not the one who ordered the AIDS test. The trial court properly dismissed the § 652B complaint because there was no genuine issue of conflicting material facts on the issue.

The rulings and judgment of the trial court were correct in all respects, and the Judgment is AFFIRMED.

---

[4] See Depositions, Record Vol II, Exh. A to Docket 153 and Docket 154, Deposition of Carolyn Taylor, Baptist Medical Center Blood Bank.

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-6013

ROBERT WAYNE LEE,
Plaintiff-Appellant,

vs.

DR. SCOTT CALHOUN,
Defendant-Appellee,

and

SCOTT W. CALHOUN, M.D., INC.,
Defendant.

ORDER
[Filed January 16, 1992]

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges, BROWN, Senior District Judge.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

SILVAN N. GOLDMAN CENTER
OKLAHOMA BLOOD INSTITUTE

Ronald O. Gilcher, MD, F.A.C.P.
Director

1001 N. Lincoln Blvd.
Okla. City, OK. 73104
(405) 232-0670

LEE, ROBERT W
1130871-5-01 SEX M AGE 38 YEAR(S)
CALHOON, SCOTT W MD RM. 4SE
OBI NUMBER: DATE ORDERED 5/21/1987

PATIENT INFORMATION:
NAME: BMCO 441 SS# or ID#_____

DIAGNOSIS:_____ AGE:_____ SEX:_____

SEND REPORT TO:_____ PHONE REPORT 949 6835
NAME AND TITLE TELEPHONE #

HOSPITAL or CLINIC: Baptist

	CITY	STATE	ZIP
ADDRESS: 3300 NW Expy	OKC	OK	73112

PLEASE CHECK TEST REQUESTED:

___ HEPATITIS PROFILE (include HBsAg, Anti-HBc, Anti-HBs, Anti-HAV, Ant-CHV, ALT)

	RESULT		RESULT
__ HBsAg	_____	__ Anti-HAV	_____
__ Anti-HBc	_____	__ Anti-HAV IgM	_____
__ Anti-HBc IgM	_____	__ Anti-CMV	_____
__ Anti-HBs	_____	__ ALT	_____IU/L
__ Anti-HBeAg	_____	X Anti-HTLV-III	positive R = 18
__ Anti-HBe	_____	__ RPR	_____
		X Western Blot	positive p55, p4, p24, p32, p18

INTERPRETATION AND COMMENTS:

The consensus at the July 31, 1985 CDC-sponsored meeting on Anti-HIV (HTLV-III) testing at the NIH on the interpretation of Anti-HIV (HTLV-III) tests results is as follows:

If the ratio of the optical density reading of the patient's sample to the cut-off value is:

≤ 2.0: Probably false positive
Repeat testing recommended in 2-3 months.

> 2.0 ≤ 7.0: Results are not conclusive
Repeat testing recommended in 2-3 months.

> 7.0: Consider true positive
(Western Blot testing is recommended for all positives).

(OBI USE ONLY) DATE AND TIME SAMPLE RECEIVED: 5/5/87 0100 TECH: 15
REPORTED BY PHONE:_____ TO:_____ TECH:___
DATE HAILED:_____ CATEGORY:_____

BAPTIST MEDICAL CENTER OF OKLAHOMA, INC.
3300 N.W. Expressway, Oklahoma City, Ok.

RESULTS

IgM Anti-HAV Negative

HBsAg Negative

Anti-HBc POSITIVE

Anti-HBs POSITIVE

INTERPRETATIVE COMMENTS

☑ No evidence of acute Hepatitis A.

☑ No evidence of acute Hepatitis B.

☐ Considered diagnostic of acute phase Hepatitis A.

☐ Considered diagnostic of acute phase Hepatitis B. (Consider carrier state or chronic hepatitis if HBsAg persistent beyond 6 months.)

☐ Consistent with early convalescent phase of Hepatitis B. (May represent post infection immunity if there has been no liver disease in past 6 months.)

☑ Consistent with recovery or immune phase of Hepatitis B.

☐ Patient is considered infectious.

☐ Patient may be infectious.

☑ Patient is not considered infectious.

☐ No serologic evidence of immunity to Hepatitis B.

☑ Serologic evidence of immunity to Hepatitis B is present.

☐ Comments:_____

_____

PATHOLOGIST B. Lanehart, MD
Pathologist

PATIENT Lee, Robert W. DOCTOR Calhoon, Scott ROOM 477

HOSPITAL NO. 5011130871 AGE 38 SEX M

ACCT # 4125 SPECIMEN DRAWN: DATE 5-5-87 TIME: 2035

LABORATORY: HEPATITIS PROFILE

OKLAHOMA TEACHING HOSPITALS LABORATORIES

T-CELL SUBSETS

477

PATIENT INFORMATION:
NAME: Lee, Robert W.
MRNO: 5011130871 BDATE: 38 y.o.
SEX : M LOCATION: Baptist Hospital Calhoon, S

SPECIMEN INFORMATION:
SPECIMEN: Whole Blood ACC#: 87FC4313
DATE COLLECTED: 5-5-87 RECEIVED: 5-6-87 PERFORMED: 5-6-87
PHYSICIAN: CALHOON

INSTRUMENT INFORMATION:
SPECTRUM III/ SYSTEM 50 : III TECH ID : NW
PMT Gains : F.W. Scatter 48 Rt Scatter 280
GRN. Fluro. 650

RESULTS:

White Blood Cell Differential : Total WBC 8600 counts/ul
Lymphocytes 25.6 % Monocytes 9.8 % Granulocytes 64.6 %

	Results % of Total Lymph.	Normal Range	Cell Count/ul	Mean Channel
Blank				48
(Pan T) OKT3	80.7	(64-78%)	1777	87
(Helper) OKT4	22.1	(35-48%)	487	70
(Suppress) OKT8	52.3	(21-34%)	1151	173
(E Rosette) OKT11	81.0	(73-85%)	1783	75
Ratio T4/T8	0.42	(1.19-2.23)		

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. CIV-88-354-T

ROBERT WAYNE LEE,
Plaintiff,

vs.

BAPTIST MEDICAL CENTER OF OKLAHOMA, INC., ET AL.,
Defendants.

[Filed March 16, 1989]

ORDER

Plaintiff Robert Wayne Lee instituted this action against Baptist Medical Center of Oklahoma, Inc.; Dr. Scott Calhoun; Oklahoma Health Care Corporation and Baptist Medical Plaza Associates, Ltd. seeking to recover for alleged medical negligence arising out of emergency surgery performed on the plaintiff. Subsequent to the publication of a newspaper article in *The Daily Oklahoman*, which contained statements made by defendant Calhoun and related certain facts about the plaintiff's medical malpractice suit, the plaintiff amended his complaint to add allegations of defamation, invasion of privacy and breach of an implied agreement of confidentiality. Defendant Scott Calhoun, M.D. has filed a motion for partial summary judgment contending that the plaintiff was not defamed because the statements he made, which appeared in the newspaper article, were true; that the plaintiff's privacy was not invaded by Dr. Calhoun's statements or by the tests conducted on the plaintiff's blood for exposure to the HTLV-III antigen; and that, because the plaintiff waived the physician-patient privilege by filing this lawsuit, he cannot recover for breach of an implied agreement of

confidentiality. For the following reasons, the court concludes that the defendant's motion should be granted in part, denied in part and deferred in part.

The plaintiff's claims, other than his cause of action for medical malpractice, are based on the divulgence by Dr. Calhoun of the fact that the plaintiff is a carrier of Acquired Immune Deficiency Syndrome virus,[1] and the publication of his statement. Defendant Calhoun seeks summary judgment on the plaintiff's defamation claim, on the ground that his statement regarding the plaintiff's status as an AIDS carrier is true. As proof, defendant Calhoun has attached to his motion a copy of the plaintiff's laboratory report. The plaintiff fails to respond to the defendant's evidence or to address his truth defense, which is a complete defense to a libel or slander action. 12 Okl. Stat. § 1444.1 See *Miskovsky v. Oklahoma Pub. Co.*, 654 P.2d 587 (Okl. 1982), cert. denied, 459 U.S. 923 (1982) (libel action); 12 Okl. Stat. § 1442 ("Slander is a false and unprivileged publication . . .) (emphasis added). Accordingly, defendant Calhoun is entitled to summary judgment on the plaintiff's defamation claim.

The plaintiff asserts that his privacy was invaded when unauthorized laboratory tests were conducted on his blood and when Dr. Calhoun publicly made statements regarding the plaintiff's status as a carrier of the AIDs virus. The Oklahoma courts have recognized the tort of invasion of privacy as set out in the Restatement (Second) of Torts, *McCormack v. Oklahoma Pub. Co.*, 613 P.2d 737 (Okl. 1980)[2], and have held that one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of an-

[1] The plaintiff does not dispute the accuracy of this fact.

[2] In McCormack, the Oklahoma Supreme Court recognized the tort of invasion of privacy in the four categories enumerated in the Restatement (Second) of Torts. Only two are pertinent here, unreasonable intrusion and unreasonable publicity.

other or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person. *Munley v. ISC Financial House, Inc.*, 584 P.2d 1336 (Okl. 1978). Restatement (Second) of Torts § 652B.

Defendant Calhoun argues that factors that are considered in determining the existence of an actionable intrusion are the means used to gain access to the alleged private information and the defendant's purpose for obtaining the information. Dr. Calhoun asserts that his knowledge of the plaintiff's carrier status "was the necessary result of the diagnostic procedures and the medical care and treatment of this patient, all of which were for legitimate medical purpose." Defendant Calhoun's Brief, p. 4. He also contends that to prevail on his claim for invasion of privacy based upon unreasonable intrusion, the plaintiff must establish an intentional interference in the solitude or seclusion of his physical being or a prying into his private affairs. Neither has been established here, defendant Calhoun asserts, because he did not order or request the laboratory studies that identified the plaintiff as a carrier of the AIDS virus.

In response, plaintiff contends that the test for exposure to the HTLV-III antigen was unauthorized and without his consent.[3] Consequently, a fact question appears to exist on the issue of whether defendant Calhoun made an intentional, unreasonable intrusion upon the plaintiff by performing an unnecessary and unauthorized test. Summary judg-

---

[3] The court would note that *neither* party submitted any evidence on this issue.

ment on the plaintiff's claim for invasion of privacy premised on § 652B of the Restatement (Second) of Torts, intrusion upon seclusion, is, therefore, denied.[4]

The plaintiff also asserts that his privacy was invaded under § 652D of the Restatement (Second) of Torts, which provides:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.[5]

Unquestionably, the statements plaintiff complains of were made public and generally would be offensive to a reasonable person. However, the court has not been convinced that the divulged facts were private, were not of public record, and were not of legitimate public concern. The parties' briefs do not adequately address these issues. The briefs also do not discuss the possibility that the defendant's statements may have been protected by a conditional

---

[4] It is unclear whether plaintiff is actually asserting a claim for unreasonable intrusion or simply one for unreasonable publicity, as he states in his brief that his objection is the "subsequent misuse of such confidential information by the defendant Calhoun through its disclosure to the public via *The Daily Oklahoman* newspaper". Plaintiff's brief, p.8. Because of the plaintiff's statement that the blood test was performed without his consent, the court assumes plaintiff intends to pursue his § 652B claim. The court will reconsider its denial of summary judgment on this claim if it determines that the statements were privileged.

[5] To state a cause of action for invasion of privacy by publicity being given to a party's private life, it is not necessary that the statements be false. *McCormack v. Oklahoma Pub. Co.*, 613 P.2d 737 (Okl. 1980).

privilege. See Restatement (Second) of Torts § § 652G, 594. The plaintiff and defendant Calhoun are directed to supplement their briefs on these points within twenty (20) days.[6]

The remaining claim of the plaintiff on which defendant Calhoun seeks summary judgment, is his cause of action for breach of an "implied agreement of confidentiality". Defendant Calhoun contends that he did not breach the confidential physician-patient relationship because the plaintiff, by commencing this lawsuit, waived the physician-patient privilege under 76 Okl. Stat. § 19. The defendant relies exclusively on the statutory language in support of his argument and fails to cite any other authority. While the court does not concur with the plaintiff's very limited interpretation of 76 Okl. Stat § 19B, that any waiver by the plaintiff is limited to statements made in a hearing or a court sanctioned proceeding, it concludes that neither party has adequately addressed this issue. They both are directed to supplement their briefs within twenty days on the question of to what extent did the plaintiff, by the commencement of this action, waive the doctor-patient privilege.

IT IS SO ORDERED this 16th day of February, 1989.

UNITED STATES DISTRICT JUDGE

[6] Plaintiff asserts that the issues of public interest are limited to the allegations he has made in his complaint. This position ignores the fact that the plaintiff's status as a carrier of the AIDS virus may have been a partial defense to the plaintiff's malpractice claim, which has been dismissed.

(2)

No. 91-1650

Supreme Court, U.S.
FILED
MAY 15 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE LEE,

Petitioner,

v.

BAPTIST MEDICAL CENTER OF OKLAHOMA, INC; DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; and BAPTIST MEDICAL PLAZA ASSOCIATES, LTD.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

GEORGE W. PAULL, JR.
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May, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

LIST OF PARTIES

Petitioner is Robert Wayne Lee, plaintiff below. Respondent is Dr. Scott Calhoon, defendant below. Although petitioner contends the lawsuit, subsequent appeal and the Petition for Certiorari were sought against Scott Calhoon, Inc., the pleadings demonstrate that the corporation was never a named party (R. 1, 31), was never served (R. 7, 8), and that the plaintiff never moved to add the corporation as a party. The Trial Court's orders dismissing plaintiff's claims (R. 131, 135, 144, 156) from which plaintiff appeals demonstrate Scott Calhoon, Inc. was not considered by the Trial Court to be a party to this action.

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No. 91-1650

In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE LEE,

Petitioner,

v.

BAPTIST MEDICAL CENTER OF OKLAHOMA, INC; DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; and BAPTIST MEDICAL PLAZA ASSOCIATES, LTD.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit issued its opinion (No. 90-6013) on November 6, 1991 (App. at 1a) and denied petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc on January 16, 1992. (App. at 43a.) The appeal was from a number of orders by the Trial Court, as cited by the Court of Appeals, including an Order of March 3, 1989 (R. 119, App. at 15a), Orders of March 16, 1989 (R. 121, App. at 17a; R. 123, App. at 19a), Order of June 27, 1989 (R. 131,

App. at 25a), Order of July 24, 1989 (R. 135, App. at 38a), Order of December 12, 1989 (R. 156, App. 40a), and judgment was entered in favor of respondent on December 12, 1989 (R. 157, App. at 42a).

STATEMENT OF THE CASE

Respondent's Statement of the Case is made pursuant to Rule 24.2 of the Rules of the Supreme Court and is made necessary by numerous inaccuracies and omissions in the petitioner's Statement of the Case. Many of these same factual inaccuracies have been propounded by the petitioner in the Trial Court and in the Appellate Court where both Courts on summary judgment and on appeal found no genuine issue of material fact to exist.

Petitioner has failed to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration as required by Rule 14.5. Petitioner's attempt to again offer "disputed facts" is not supported by the record and is irrelevant to this Court's determination whether to accept certiorari. Respondent submits the following Statement of the Case material to the questions presented pursuant to Rule 14(g).

Petitioner, Robert Wayne Lee, plaintiff below, sued respondent, Scott Calhoon, M.D., defendant below, and certain other defendants for medical negligence in the amount of Thirteen Million Dollars ($13,000,000.00) and Twenty-Five Million Dollars ($25,000,000.00) punitive damages. (R. 1.) The plaintiff complained that defendant

negligently performed emergency surgery to treat plaintiff's perforated colon. Plaintiff's lawsuit was filed in the United States District Court for the Western District of Oklahoma on March 1, 1988. Because of the notoriety that often accompanies lawsuits seeking such huge damage awards, Dr. Calhoon was approached by a local news reporter and questioned about the lawsuit and plaintiff's allegations of medical malpractice. There was no evidence, as petitioner states, of "an unauthorized disclosure" based on "malicious" [sic] and "self interest." In response to questions by the reporter, Dr. Calhoon attempted to explain the medical facts pertinent to his defense of this Thirty-Eight Million Dollar ($38,000,000.00) lawsuit. (R. 132, Affidavit of Dr. Calhoon.)

There was no evidence, again as petitioner states, that defendant "withheld" medical records. Hospital medical records were in the custody of the hospital and not in the custody or possession of Dr. Calhoon and, no motion to obtain records was ever filed against Dr. Calhoon. Plaintiff below did not need to file a $38,000,000.00 lawsuit to obtain medical records. Section 19 of Title 76 of the Oklahoma Statutes entitled plaintiff to obtain copies of his medical records which were in the possession of codefendant, Baptist Medical Center. The discovery abuses petitioner alleges in his Petition simply are without foundation.[1]

---

[1] *Plaintiff's admission that he filed a multimillion dollar, medical-negligence lawsuit without reviewing his own hospital records, in the hope that his lawsuit was not frivolous, speaks more to the*

(Continued on following page)

Plaintiff's original Complaint had alleged that Dr. Calhoon had not advised plaintiff prior to surgery, an appendectomy, that he might have a perforated bowel which would require a colostomy. Dr. Calhoon explained to the newspaper reporter who contacted and questioned him about such allegations that had plaintiff advised him or had he known prior to surgery that Mr. Lee was an AIDS carrier, Dr. Calhoon would have been alerted to the higher probability of a perforated bowel. (R. 132, Affidavit of Dr. Calhoon.) Plaintiff, in fact, was an AIDS carrier. (R. 48, 49.) Petitioner's statement in his brief that "there has never been . . . evidence from any other doctor that there is any connection whatsoever between the medical malpractice case and AIDS" is flatly inaccurate.[2] Plaintiff's own expert witness, testifying in deposition, agreed that the results of the HIV tests were extremely important in the medical care of Mr. Lee. (R. 83, 84, Deposition of James A. Fenimore, at 77.)

A perforated bowel is a common result of infections which are common with immuno-compromised patients who are AIDS carriers. (R. 132, Affidavit of Dr. Calhoon.) Had plaintiff advised Dr. Calhoon that he was an AIDS carrier, Dr. Calhoon would have informed plaintiff of the possibility of a perforated bowel which might require a colostomy. (R. 132, Affidavit of Dr. Calhoon.) Dr. Calhoon, in fact, only learned that plaintiff was an AIDS

(Continued from previous page)

judgment of his counsel. Plaintiff asserts wholly irrelevant and specious reasoning to argue that plaintiff's own ignorance of facts and law is somehow the fault of respondent.

[2] *See fn. 1, supra.*

carrier after surgery. (R. 128, Deposition of Dr. Calhoon.) The evidence showed that a test for exposure to HTLV-III antigen (an indicator of the AIDS virus) was ordered *not* by the defendant, but instead by an emergency room physician on the day of plaintiff's admission. (R. 128, Exhibit "1.") Plaintiff's own expert witness confirmed that Dr. Calhoon had not ordered the AIDS test. (R. 83, 84, Deposition of Dr. James Fenimore, at 78.) The results of the test were not learned by defendant until two (2) days later. (R. 153, Deposition of Carolyn Taylor.) Because plaintiff had failed to inform Dr. Calhoon and Dr. Calhoon did not know that plaintiff was an AIDS carrier, the initial working diagnosis prior to surgery had been "possible acute appendicitis." Thus, Dr. Calhoon's comments to the reporter were limited to the facts and issues relevant to his defense. (R. 132, Affidavit of Dr. Calhoon.)

Subsequent to publication of a newspaper article in *The Daily Oklahoman* setting out Dr. Calhoon's statements concerning his defense to the $38,000,000.00 malpractice lawsuit, plaintiff amended his Complaint to include claims for defamation, invasion of privacy, and breach of an implied agreement of confidentiality. Plaintiff alleged that defendant, notwithstanding the fact that plaintiff had filed the malpractice lawsuit, had publicly disclosed that plaintiff was "allegedly infected and suffering from Acquired Immune Deficiency Syndrome (AIDS.)" (R. 31.) The medical malpractice claims were subsequently dismissed by plaintiff against all parties including defendant, Scott Calhoon, M.D. (R. 86.)

The Trial Court ordered pursuant to 76 Oklahoma Statutes § 19 that the physician-patient privilege was waived following plaintiff's institution of the malpractice

action. (R. 17.) The Court ruled "any privilege granted by law concerning . . . any physical or mental condition of Robert Wayne Lee . . . has been waived by the filing of this action." (R. 17.) Plaintiff and defendant both filed Motions for Summary Judgment. (R. 48, 49, 93, 94.) On March 16, 1989, the Court granted summary judgment in defendant's favor on the defamation claim and denied both parties' motions for summary judgment on the invasion of privacy claim pursuant to Section 652(B) of the Restatement (Second) of Torts (Invasion Upon Seclusion). (R. 121, 123.) The Court requested supplemental briefs on plaintiff's claims of invasion of privacy pursuant to Section 652(D) of the Restatement and breach of an implied agreement of confidentiality. (R. 123.) The Trial Court subsequently concluded that defendant Calhoon was entitled to judgment on the claim for invasion of privacy under Section 652(D) and breach of privilege claims. (R. 131, 135.) Thus, the only remaining claim was plaintiff's Section 652(B) claim for intrusion upon seclusion and the Court permitted plaintiff additional time for discovery on the issue. (R. 135.) The Court subsequently granted judgment for defendant. (R. 144.)

However, plaintiff then filed a Motion to Reconsider (R. 146) which the Court granted and *again* permitted plaintiff additional time in which to conduct discovery. (R. 149.) The Trial Court ultimately ruled that plaintiff had failed to submit sufficient proof to controvert evidence by defendant that a Section 652(B) claim did not exist and granted summary judgment in the defendant's favor. (R. 156.) Judgment was entered consistent with the Orders entered on the various claims on December 12,

1989 (R. 157) and it was from this judgment that the appeal was taken.

The Tenth Circuit Court of Appeals affirmed the rulings of the Trial Court, finding that plaintiff had waived his physician-patient privilege and that defendant's statements were conditionally privileged and did not violate plaintiff's privacy under Section 652(B) of the Restatement of Torts. Plaintiff's contentions that the Trial Court had unduly limited discovery and that disputed factual issues and lack of consent for the AIDS test precluded dismissal on summary judgment were found by the Tenth Circuit to be without merit.

In addition to the inaccuracies in petitioner's Statement of the Case cited above, petitioner now alleges for the first time that respondent made a disclosure to the public "in the form of a newspaper release" as opposed to responding in an interview; that respondent's "cumulative gross assets are well in excess of Seven Hundred Million Dollars ($700,000,000.00);" and that petitioner "has been forced to quit his job, move to a new city, and change his name in order to avoid persecution and further embarrassment," and that he is forced to live "as a second class citizen." Again, any such "facts" are not to be found in the record, before the lower Courts.

SUMMARY OF THE ARGUMENT

The case petitioner seeks to have this Court review is a straightforward determination by the Tenth Circuit Court of Appeals that petitioner, plaintiff below, failed to meet his burden on summary judgment. There is nothing

in the Opinion by the Court of Appeals which demonstrates either a conflict with decisions of this Court, other courts of appeal, other decisions by the Tenth Circuit itself or an inappropriate application of state law. Certiorari has been sought inappropriately by the petitioner and cannot be supported under Rule 10 of the Rules of the Supreme Court.

ARGUMENT

I. PETITIONER HAS FAILED TO DEMONSTRATE ANY CONFLICT ARISING OUT OF THE COURT OF APPEALS' DECISION INTERPRETING THE RESTATEMENT (SECOND) OF TORTS OR THE APPLICATION OF STATE LAW TO SUPPORT THE GRANTING OF CERTIORARI.

Once again, in Proposition I of petitioner's Argument in support of his Petition for Writ of Certiorari, petitioner has presented an incomplete and therefore inaccurate statement of the facts pertaining to the decision by the District Court and the Circuit Court and facts therefore relating to a decision by this Court regarding certiorari.

Petitioner argues the District Court in its June 27, 1989 Order (R. 131, App. at 25a) "admitted that there was no evidence presented that the information" (given by Dr. Calhoon to a reporter) "was relevant to the medical malpractice action, but only 'apparently pertained' to the action. . . . " Accordingly, argues petitioner, there was no evidence of a legitimate concern to the public under 652(D)(b) of the Restatement and therefore the District Court and the Tenth Circuit erred in ruling that there was

no actionable invasion of privacy. Petitioner argues that the Court of Appeals has extended the meaning of Section 652(D)(b) creating an irreconcilable conflict with all other circuits in this Court.

Incredibly, petitioner has omitted significant portions of the District Court's June 27, 1989 Order and a subsequent Order by the District Court on July 24, 1989. (R. 135.) (Both Orders are conspicuously absent from petitioner's Appendix.) These Orders demonstrate unequivocally that the lower Courts' rulings were correct and based on evidence submitted by defendant Calhoon without any evidence supplied by plaintiff Lee. In the June 27, 1989 Order, the District Court ordered respondent Calhoon to provide, within five (5) days, evidence that his comments pertained to the defense of the lawsuit and granted petitioner ten (10) days therefrom to submit any evidence to the contrary. (R. 131 at 5, fn. 4.) The Trial Court postponed a final decision granting judgment in defendant's favor pending a review of evidence submitted by the parties. (*Id.* at 2, fn. 2.) Within three days Dr. Calhoon submitted an Affidavit affirmatively establishing the connection between his comments to a reporter and the medical malpractice lawsuit filed against him. (R. 132.) Plaintiff below filed *nothing* in support of Section 652(D) claim for invasion of privacy and, accordingly, on July 24, 1989 the District Court ruled "because the plaintiff has not submitted any evidence in support of his 652(D) . . . claim or his breach of confidentiality claim, to refute the evidence submitted by defendant, the Court's decisions with respect to these two claims are now final."

(R. 135 at 2.) The Tenth Circuit simply affirmed the District Court's holding. Thus, contrary to petitioner's argument there was no unreasonable extension of the Section 652(D)(b) principles or any irreconcilable conflict to support certiorari. The lower Courts merely recognized that petitioner, plaintiff below, failed to meet his burden on summary judgment. Under *Celotex Corp. v. Catrett*, 477 U.S. 316, 321 (1986) entry of summary judgment is mandated after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial.

Assuming arguendo, the existence of some conflict as to questions controlled by state law (i.e. application of the Restatement [Second] of Torts), this Court has held that conflict among the circuits is not a reason for granting a writ of certiorari. *Ruhlin v. New York Life Insurance Co.*, 304 U.S. 202, 206 (1938). Conflict may merely be a corollary to permissible differences of opinion in state courts. *Id.* Petitioner fails to demonstrate that the Tenth Circuit's ruling is in conflict with Oklahoma state law as expressed in *McCormack v. Oklahoma Publishing Co.*, 613 P.2d 737 (Okla. 1980). Here, the Tenth Circuit has reached a reasonable and permissible result under *McCormack*. The Tenth Circuit held a legitimate public concern under *McCormack* existed because plaintiff had filed a 38 million dollar lawsuit *and* because of the nature of the lawsuit. This Court has refused to review state-law questions where a decision by the highest Court of the state is ground for review of the Court of Appeals decision. *Butner v. United States*, 440 U.S. 48 (1979). This Court has said "[t]he

federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." *Id.* at 57.

As to any purported conflict between the decision by the Court of Appeals in the instant case and decisions of this Court cited by petitioner, petitioner must show an intolerable conflict. Petitioner must demonstrate a conflict on the *same matter* of law and fact, not merely an inconsistency in dicta or in the general principles utilized. *Layne and Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-93 (1923). Petitioner's references to *Time, Inc. v. Hill*, 385 U.S. 374 (1967), *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) and *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) do not demonstrate an intolerable conflict between this Court's recognition of the Constitutional guarantees of freedom of the press and respondent's interest in his own reputation as a medical provider and his right to protect that interest.

Similarly, petitioner has failed to demonstrate that any foundation for review by this Court of the lower Courts' rulings that petitioner had waived the physician-patient privilege thereby foreclosing an action for breach of implied warranty. Petitioner can only point to general principles as set out in *Doe v. Coughlin*, 697 F. Supp. 1234 (N.D. N.Y. 1988) and *Woods v. White*, 689 F. Supp. 874 (W.D. Wis. 1988), which are not irreconcilable with the instant case. Both cases are distinguishable and neither demonstrate the existence of any conflict. *Layne, supra* at 392-93. In *Woods*, the Court ruled that casual, unjustified dissemination of medical information by governmental employees to non-medical staff and prisoners was not a

discretionary function protected by qualified immunity. Public policy does not require the protection of non-discretionary governmental functions. However, in the instant case, once a patient has waived confidentiality concerning his medical condition, the public policy supporting the physician-patient privilege is not thwarted by discussion of such medical conditions. *Doe* concerned the automatic transfer of prisoners infected with AIDS to a special dormitory which the Court viewed as effectively revealing an inmate's medical condition without his consent. Here, petitioner affirmatively placed his medical condition in issue by filing his lawsuit and waived confidentiality of his medical condition. Certiorari is unnecessary to address any relationship of the instant case to either *Woods* or *Doe*.

Finally, petitioner argues the waiver issue should be reviewed by this Court because petitioner was "denied access to medical records" and that "it is beyond reasonable expectation that he voluntarily waived any right to privacy by filing the Complaint."[3] As pointed out above, petitioner was entitled to obtain his records pursuant to Section 19 of Title 76 of the Oklahoma Statutes. The hospital records were in the possession and control of Baptist Medical Center, *not* the respondent. 76 Oklahoma Statute § 19 provides:

> B. In cases involving a claim for personal injury or death against any practitioner of the healing arts or a licensed hospital, arising out of patient care, where any person has placed his physical or mental condition in issue by the commencement of any action, proceeding or suit

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[3] *See fn. 1, supra.*

> for damages, or where any person has placed in issue the physical or mental condition of any other person or deceased person by or through whom such person rightfully claims, he shall be deemed to waive any privilege granted by law concerning any communication made to a physician or health care provider with reference to any physical or mental condition or any knowledge obtained by such physician or health care provider by personal examination of any such patient provided that before any such communication, medical or hospital record or testimony is admitted in evidence in any proceeding it must be material and relevant to an issue therein, according to existing rules of evidence.

Review of the language of Section 19 reveals that waiver operates as a matter of law when any person has placed his physical or mental condition in issue by the commencement of an action. Under such circumstances "he *shall be deemed* to waive any privilege. . . . " (Emphasis added.)

Petitioner argues at Proposition III that because he did not give his consent to the surgery under *Smith v. Reisig*, 686 P.2d 554 (Okla. 1980) that somehow a question of fact was created to defeat summary judgment in favor of defendant. Certainly, it is well-established that consent to surgery is not required when a medical emergency exists such as in the present case. *Scott v. Bradford*, 606 P.2d 554 (Okla. 1980); (*See also*, R. 132, Affidavit of Dr. Calhoon). Respondent believes petitioner's argument is irrelevant to any question of waiver, or whether respondent's remarks were conditionally privileged, or whether petitioner was a public figure with a lawsuit which was a matter of public interest. It is important to note that

petitioner has raised issues of informed consent on appeal, where petitioner *dismissed* the very medical malpractice action asserting these same issues. (R. 86.) Petitioner inappropriately seeks certiorari to re-work his lawsuit.

Further, petitioner would have this Court believe that because his counsel's poorly managed discovery failed to yield documents sufficient to support his own summary judgment motion or to rebut respondent's summary judgment motions below that surely "other" information must exist and the only "explanation" is that documents have been withheld. Such speculation oversteps the bounds of advocacy and certainly is incapable of invoking this Court's jurisdiction.

II. ANY ALLEGED CONFLICT BETWEEN THE COURT OF APPEALS' OPINION IN THE INSTANT CASE AND A SUBSEQUENT DECISION OUT OF THE SAME CIRCUIT WILL NOT SUPPORT A WRIT OF CERTIORARI.

The Court of Appeals' decision below that there was no violation of breach of implied warranty of confidentiality was based in the first instance on petitioner's waiver of the physician-patient privilege. The Court of Appeals found the language of the Title 76 Oklahoma Statute § 19, "very plain, and all inclusive – it covered 'any privilege,' and 'any communication' with reference to 'any physical or mental condition.' " (App. at 11a.) Under Oklahoma law, where the language of a statute is plain and unambiguous, and its meaning clear, the statute

will be accorded the meaning as expressed by the language employed. *Cave Springs Public School Dist. I-30*, 613 P.2d 1046 (Okla. 1980).

In addition to the authority provided by Section 19 of Title 76, the Court found "*further* support" (emphasis added) for the finding of waiver of the physician-patient privilege in 12 Oklahoma Statute § 1443.1. (App. at 11a.) Section 1443.1 was not the exclusive basis for denial of the claim of breach of implied warranty of confidentiality. Any "error" arising out of the application of § 1443.1 does not support certiorari.

In addition, the case law relied on by petitioner does not support certiorari. The issue before the Court of Appeals in *Kleier Advertising, Inc. v. Premier Pontiac, Inc.*, 921 F.2d 1036 (10th Cir. 1990), cited by petitioner, was whether a businessman's statements to a newspaper about a copyright infringement action against his company were privileged under Section 1443.1 so as to defeat a defamation action. No collateral issue of an express waiver pursuant to 76 Oklahoma Statute § 19 was before the Court in *Kleier*. Thus, the *Kleier* decision is distinguishable from the instant case on the facts and the law and no conflict exists to support a writ of certiorari. *Layne and Bowler Corp. v. Western Well Works*, 261 U.S. 387, 392-93 (1923). In addition, this Court has denied certiorari where there were inconsistent decisions by the Court of Appeals within the same circuit. *Davis v. United States*, 417 U.S. 333, 340 (1974). It has been suggested that such conflicts are intracircuit conflicts to be resolved by the Court of Appeals itself. *Id.* Thus, to the extent any such conflict may be perceived to exist in the instant case, it

should be resolved by the Tenth Circuit and review by this Court is not required.

CONCLUSION

For the above reasons, respondent submits that petitioner has failed to demonstrate a foundation for review by this Court under Rule 10 of the Rules of the Supreme Court. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GEORGE W. PAULL, JR.
(Counsel of Record)

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Attorneys for Respondent

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 90-6013
ROBERT WAYNE LEE,

Plaintiff-Appellant,

vs.

DR. SCOTT CALHOUN,

Defendant-Appellee,

SCOTT W. CALHOUN, M.D., Inc.,

Defendant.

[Filed November 6, 1991]

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. Civ. 88-354-T)

Dianna S. Wisdom, Oklahoma City, Oklahoma, for Plaintiff-Appellant.

George W. Paull, Jr., (George F. Short and Cynthia L. Sparling, Oklahoma City, Oklahoma; of counsel, Short, Barnes, Wiggins, Margo & Adler, with him on the brief) for Defendant-Appellee Scott Calhoon, M.D.

Before MOORE AND EBEL, Circuit Judges, and BROWN,* Senior District Judge.

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* Honorable Wesley E. Brown, United States Senior District Judge, District of Kansas, sitting by designation

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BROWN, Senior District Judge.

Plaintiff Robert Wayne Lee filed suit for medical malpractice. The claim arose from emergency surgery performed upon plaintiff to repair a perforated bowel. When the suit was filed, a reporter approached the defendant Dr. Calhoon.[1] The doctor explained that plaintiff's medical condition, requiring emergency surgery, was a consequence of patients who are AIDS carriers. This explanation appeared in a news item published in *The Daily Oklahoman*.

The facts are not in dispute. Plaintiff went to the emergency room of Baptist Hospital on May 3, 1987. He was examined by Dr. Crook and Dr. Camp, who diagnosed "possible acute appendicitis," and defendant Dr. Calhoon was called in for an evaluation. (Record Vol. II, Item 152.) Dr. Crook and Dr. Camp are not defendants in this action. Plaintiff signed a consent form for an appendectomy. Dr. Calhoon operated on the plaintiff. The surgery revealed that he suffered from a perforated bowel rather than appendicitis. Dr. Calhoon therefore performed a colostomy. A blood test subsequently revealed that plaintiff had tested positive for AIDS (the "HIV" virus).

Plaintiff then filed suit claiming Calhoon had misdiagnosed his condition and failed to obtain his consent

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[1] "Calhoon" is the correct spelling of defendant's surname.

for the unnecessary surgical procedure which was performed. Plaintiff's complaint, filed March 1, 1988, sought $38 million damages. The interview with the reporter took place on March 2, the day after the lawsuit was filed. The news item which appeared in the Daily Oklahoman was as follows:

> Calhoon said Tuesday that Lee needed emergency surgery because he had a perforated colon and was infected with the acquired immune deficiency syndrome virus.
>
> "He was seen in the emergency room and thought to have appendicitis," Calhoon said.
>
> "This was before we identified that he was a carrier of the AIDS virus. He needed emergency surgery and at that time a perforated colon was identified.
>
> "Life-saving surgery was performed, which was a temporary colostomy. He had a preoperative diagnosis of appendicitis because he gave us no history of being an AIDS carrier.
>
> "If we had known of his AIDS exposure, other more esoteric types of infections, which are common in immuno-compromised hosts, would have been considered." Calhoon.

After this story appeared in the paper, plaintiff amended his complaint to include defamation, invasion of privacy, and breach of doctor/patient confidentiality.

The malpractice claim was dismissed,[2] and summary judgments were entered in favor of defendant Calhoon

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[2] Plaintiff moved to dismiss with prejudice all of the defendants in this action with regard to his medical

(Continued on following page)

upon findings that plaintiff had waived his physician-patient privilege, and that plaintiff had failed to establish his right to proceed on his claims of defamation, invasion of privacy, and "intrusion upon seclusion."

In this appeal plaintiff contends that the district court erred in findings that plaintiff had waived the physician/patient privilege, and had further erred in finding that Dr. Calhoon's statements were conditionally privileged and did not violated plaintiff's privacy under Restatement (Second) of Torts § 652B. Plaintiff further contends that the trial court unduly limited discovery, and that disputed factual issues, and lack of consent for administering the AIDS test precluded dismissal of his claims by summary judgment.

Following our review of the record, we find no error and affirm the judgment.

The trial court entered a number of orders on cross motions for summary judgment before reaching a final judgment in this case, and it is necessary to discuss these in some detail.

By an order of March 3, 1989, the court dismissed plaintiff's claims of defamation, invasion of privacy and breach of confidentiality against Baptist Medical Center,

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malpractice claims and to dismiss without prejudice the defendants Baptist Medical Center of Oklahoma, Oklahoma Healthcare and Baptist Medical Plaza Associates with regard to his invasion of privacy and disclosure of private information claims, reserving these claims only as to Dr. Calhoon. Record. Vol. I, Item 86.

Oklahoma Health Care & Baptist Medical Plaza Associated (Record Vol. I, Docket No. 119); and by order of March 16, (Docket No. 124), the court found that plaintiff failed to state a claim against these defendants, and their motion to dismiss was granted.

Additional orders were entered on March 16, (Record Vol. II, Docket Nos. 122, 123, 124). The court found that Dr. Calhoon was entitled to summary judgment on the plaintiff's defamation claim because his statement regarding plaintiff's status as an AIDS carrier was true. The court denied both parties' motions for summary judgment on other claims. The parties were directed to supplement the record with reference to plaintiff's claims for invasion of privacy as set out under Restatement (Second) of Torts § 652A. Thus, one who invades the privacy of another is liable for resulting harm when there is an "unreasonable intrusion upon the seclusion of another" (§ 652B), or "appropriation of the other's name or likeness" (§ 652C), or "publicity that unreasonably places the other in a false light before the public (§ 652E).

Plaintiff's claim of "intrusion upon seclusion" is based on provisions of § 652B:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

Section 652B liability does not require publication of private matters. The invasion may consist of forced entry into a person's home, eavesdropping or spying upon a

person's private affairs, or tampering with a person's private papers or mail.

Plaintiff's "invasion of privacy" claim is based upon § 652D which provides in pertinent part that:

> One who gives publicly to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.

Liability under this section is based upon publicity given to true statements of fact. "There is no liability when the defendant merely gives further publicity to information about the plaintiff that is already public." Comment b, § 652D.

In *McCormack v. Oklahoma Publishing Co.*, 613 P. 2d 737 (Okl. 1980), the Oklahoma court recognized a right of action for invasion of privacy, if a plaintiff could establish the public disclosure of a private fact, when such fact was not of "legitimate public concern."[3]

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[3] In *McCormack* a news story related that plaintiff, "a one-time gambler and illegal casino operator in Oklahoma City," had connections with the Mafia and organized crime. Plaintiff claimed that the events mentioned occurred more than twenty years before, and that the publication invaded his right of privacy. While recognizing the tort of invasion of privacy, the court found that plaintiff made no allegation that the facts were private and not of public record, and did not allege that the facts were not of legitimate public concern. Dismissal of the

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The district court correctly found that plaintiff became a figure by filing his lawsuit, since the size of his claim – $38 million – and the nature of the claim – malpractice, had attracted the attention of the news media. As the court noted, these matters are of legitimate public concern "because of the public interest or debate regarding the size of litigation claims and jury awards . . . and the public concern in policing failures in the medical profession." In *Gilbert v. Medical Economics Company,* 665 F. 2d 305 (10th Cir. 1981), the defendant published an article discussing the personal and professional problems of a physician involved in two incidents of alleged malpractice. This court affirmed the grant of summary judgment to the publisher, recognizing that the article was of legitimate public interest, since it involved the competency of licensed professionals. We there noted that the publication of plaintiff's psychiatric and marital problems were "substantially relevant to the newsworthy topic," through "the rational inference that plaintiff's personal problems were the underlying cause of the acts of alleged malpractice." *Gilbert v. Medical Economics Co. supra,* 665 F. 2d at 308-309.

With respect to the question of whether the doctor's comments pertained to his defense of the lawsuit, the court ordered Dr. Calhoon to provide evidence of this fact within five days of the order. On June 30, Dr. Calhoon

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case was affirmed upon the finding that there could be no liability for publicizing facts which were matters of public record.

supplied an affidavit establishing this connection (Record Vol. II, Item 132):

> I affirmatively state that the statement made by me in response to questions by the newspaper reporter, and as printed in the newspaper article at issue in this case, were simply expressions of the facts and issues relevant to my defense in this multi-million dollar lawsuit about which I was being questioned. Mr. Lee's original lawsuit alleged that I did not advise him prior to the surgery that he might have a perforated bowel and require a colostomy. In my defense, had Mr. Lee advised me or had I known prior to surgery that Mr. Lee was an AIDS virus carrier, I would have been alerted to a higher probability that he might have a perforated bowel due to more esoteric types of infections which are common with immuno-compromised patients such as Mr. Lee, and I would have so informed him.

In this case, Dr. Calhoon's comments clearly pertained to his defense of the lawsuit, and, as found by the trial court, "were sufficiently related to the news story to preclude them from serving as the basis for an invasion of privacy claim."

The district court also found that defendant Calhoon was entitled to summary judgment on plaintiff's § 652 invasion of privacy claim because even if the plaintiff had not become an involuntary public figure, with a lawsuit which was a matter of public interest, Dr. Calhoon's statements were conditionally privileged under § 594. The elements of conditional privilege as set out in § 593 provide that one who publishes defamatory material is not liable if "the matter is published upon an occasion

that makes it conditionally privileged, and the privilege is not abused." The trial court correctly found that the defendant did not abuse the conditional privilege. Section 594 of the Restatement provides that:

> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> (a) there is information that affects a sufficiently important interest of the publisher, and
>
> (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

The principle set out in § 594 simply means that one whose reputation is under attack has the right to defend himself:

> A conditional privilege exists . . . when the person making the publication reasonably believes that his interest in his own reputation has been unlawfully invaded by another person and that defamatory matter that he publishes about the other is reasonably necessary to defend himself. The privilege here is analogous to that of self-defense against battery, assault or false imprisonment . . . Thus the defendant may publish in an appropriate manner anything that he reasonably believes to be necessary to defend his own reputation against the defamation of another . . . (Comment k, § 594)

The occasion upon which Dr. Calhoon made his statement and explanation, in response to the reporter's inquiry into the circumstances of the lawsuit, was clearly an instance in which Dr. Calhoon was entitled to provide

information that affected his important interest in his own reputation as a medical provider. Plaintiff failed to provide any evidence that defendant abused his conditional privilege, and under such circumstance, the trial court properly entered summary judgment in favor of defendant upon the § 652 invasion of privacy claim.

As to plaintiff's claim for breach of an "implied agreement of confidentiality," the district court found that plaintiff had waived the physician-patient privilege under 76 Okl. Stat. § 19, which provides in pertinent part that:

> In cases involving a claim for personal injury or death against any practitioner of the healing arts or a licensed hospital, arising out of patient care, where any person has placed his physical or mental condition in issue by the commencement of any action, proceeding or suit for damages, . . . *shall be deemed to waive any privilege* granted by law concerning *any* communication made to a physician or health care provider . . . or *any* knowledge obtained by such physician or health care provider by personal examination of any such patient; provided that, before any such communication, medical or hospital record or testimony is admitted in evidence in any proceeding it must be material and relevant to an issue therein according to existing rules of evidence. (Emphasis supplied.)

It is clear that Dr. Calhoon's comments were entirely relevant to the medical malpractice action in question, and the information he gave was the subject matter of his defense to plaintiff's allegation of malpractice. Indeed, his explanation of the cause and need for emergency

surgery entirely justified the dismissal of all malpractice claims. Here the Oklahoma statute is very plain, and all inclusive – it covered "any privilege," and "any communication," with reference to "any physical or mental condition." Under Oklahoma law the language of the statute must prevail. In *Cave Springs Public School District I. 30.* 613 P. 2d 1046 (Okl. 1980), the rule was stated in this manner:

> Where the language of a statute is plain and unambiguous, and its meaning clear and no occasion exists for the application of rules on construction, the statute will be accorded the meaning as expressed by the language therein employed.

Further support for the finding of a waiver of the physician-patient privilege is found in the trial court's reference to 12 O.S. § 1443.1, which provides that expressions of opinion in regard to judicial proceedings are not actionable as libel:

> 1443.1. Privileged communications defined – Exemption from libel
>
> A. A privileged publication or communication is one made:
>
> First. In any legislative or judicial proceeding or any other proceeding authorized by law;
>
> Second. In the proper discharge of an official duty;
>
> Third. By a fair and true report of any legislative or judicial or other proceeding authorized by law, or anything said in the course thereof, and any and all expressions of opinion in regard thereto, and criticisms thereon, and any and all

> criticisms upon the official acts of any and all public officers, except where the matter stated of and concerning the official act done, or of the officer, falsely imputes crime to the officer so criticized.
>
> B. No publication which under this section would be privileged shall be punishable as libel.

The trial court properly ruled that plaintiff waived the physician-patient privilege, and the entry of summary judgment in favor of defendant upon the claim of breach of the implied warranty of confidentiality was appropriate.

With respect to plaintiff's "invasion of privacy" claim, (§ 652B, *supra*, intrusion upon seclusion) which was based upon the allegation that blood had been drawn for the AIDS test without his permission, the court permitted the parties to submit additional information concerning the matter.

On July 24, 1989, the court allowed plaintiff time to conduct additional discovery "limited to the question of whether defendant Calhoon ordered the AIDS tests or knew that they had been ordered and approved or ratified such." (Record Vol. II, Item 135).

On October 11, 1989, the court entered an order and final judgment granting defendant Calhoon summary judgment on plaintiff's remaining claim for invasion of privacy under § 652B because plaintiff failed to provide evidence to support such claim. Record Vol. II, Items 144, 145. On plaintiff's motion, the order and judgment were vacated and plaintiff was granted additional time until December 4 to conduct any further discovery necessary

to establish his invasion of privacy claim. Record Vol. II, Item 149, Order of November 1, 1989. After reviewing all of the evidence presented by the parties on the issue, the court determined that plaintiff had failed to submit sufficient proof to controvert the evidence submitted by Dr. Calhoon which was to the effect that he did not order or authorize AIDS tests on the occasion in question. In accordance with these findings, judgment was again entered in favor of defendant, Dr. Calhoon. (Order and Judgment of December 12, 1989, Record Vol. II, Items 156, 157.)

In sworn statements, Dr. Calhoon denied that he ordered tests to determine plaintiff's AIDS status. (Vol. II, Item 128, Exhibits "A," "B"). Dr. Calhoon first learned that plaintiff was HIV positive on May 5, two days following the operation.

Plaintiff's argument that the tests were ordered by Dr. Calhoon is pure speculation and contrary to the evidence presented to the trial court. In lab reports submitted by plaintiff himself, several other doctors are noted as requesting tests – i.e., Doctors Gilcher, Crook, Camp, and "Non-Staff M.D." (Record Vol. II, Exhibits to Item 133.)

On the basis of affidavits and depositions presented on the issue the trial court made these findings:

> The plaintiff has filed his supplemental response and, in addition to failing to explain his exhibit "B," has failed to submit sufficient proof to controvert the evidence submitted by the defendant that he did not order or authorize either of the two AIDS tests. To the contrary, the only credible evidence establishes that the initial

> test was ordered by Dr. Crook and the subsequent test was automatically required by the Baptist Medical Center's blood bank due to the results of the HTLV-III test.[4]

Plaintiff failed to submit any evidence to controvert defendant's evidence that Dr. Calhoon was not the one who ordered the AIDS test. The trial court properly dismissed the § 652B complaint because there was no genuine issue of conflicting material facts on the issue.

The rulings and judgment of the trial court were correct in all respects, and the Judgment is AFFIRMED.

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[4] See Depositions, Record Vol. II, Exh. A to Docket 153 and Docket 154, Deposition of Carolyn Taylor, Baptist Medical Center Blood Bank.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT WAYNE LEE, Plaintiff, vs. BAPTIST MEDICAL CENTER OF OKLAHOMA, INC.; DR. SCOTT CALHOUN; OKLAHOMA HEALTHCARE CORPORATION; AND BAPTIST MEDICAL PLAZA ASSOCIATES, LTD., Defendants.	)	No. CIV-88-354-T (Filed Mar. 3, 1989)

ORDER

Upon written stipulation, the parties request the Court dismiss with prejudice plaintiff's claims of defamation, invasion of privacy and breach of confidentiality as to the defendant hospital entities only, thereby dismissing all causes of action against Baptist Medical Center of Oklahoma, Inc., Oklahoma Healthcare Corp. and Baptist Medical Plaza Associates, Ltd. Accordingly, plaintiff's claims of defamation, invasion of privacy and breach of confidentiality against Baptist Medical Center of Oklahoma, Inc., Oklahoma Healthcare Corp. and Baptist Medical Plaza Associates, Ltd. only are dismissed with prejudice and plaintiff reserves these claims against Dr. Scott Calhoun and Scott Calhoun, M.D., Inc.

IT IS SO ORDERED this 3rd day of March, 1989.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 3-3-89

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT WAYNE LEE, Plaintiff, vs. BAPTIST MEDICAL CENTER OF OKLAHOMA, INC., et al., Defendants.	)	NO. CIV-88-354-T (Filed Mar. 16, 1989)

ORDER

Plaintiff Robert W. Lee has filed a motion for partial summary judgment which is ruled upon as follows.[1] With respect to the plaintiff's claims against defendant Baptist Medical Center of Oklahoma, Inc. ("Baptist"), the court concludes the jury should determine whether Baptist may be held liable for defendant Calhoun's conduct under the doctrine of respondeat superior. As the court has granted summary judgment in favor of defendant Calhoun and defendant Baptist on the plaintiff's defamation claim, the plaintiff's motion, insofar as it pertains to his slander and libel claims is denied, as is his request for judgment on his § 652B invasion of privacy claim. Ruling is deferred on the plaintiff's § 652D invasion of privacy claim and his breach of an implied agreement of confidentiality claim,[2]

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[1] The reasons for the court's decisions are contained in the orders entered on defendant Calhoun's and defendant Baptist's summary judgment motions.

[2] Subsequent to the court's decision on these claims, a ruling will be made on the defendants' pending motion to compel.

pending receipt of supplemental briefs on these issues, which the court has directed the parties to file.

IT IS SO ORDERED this 16th day of March, 1989.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT WAYNE LEE, Plaintiff, vs. BAPTIST MEDICAL CENTER OF OKLAHOMA, INC., et al., Defendants.	)	NO. CIV-88-354-T (Filed Mar. 16, 1989)

ORDER

Plaintiff Robert Wayne Lee instituted this action against Baptist Medical Center of Oklahoma, Inc.; Dr. Scott Calhoun; Oklahoma Health Care Corporation and Baptist Medical Plaza Associates, Ltd. seeking to recover for alleged medical negligence arising out of emergency surgery performed on the plaintiff. Subsequent to the publication of a newspaper article in The Daily Oklahoman, which contained statements made by defendant Calhoun and related certain facts about the plaintiff's medical malpractice suit, the plaintiff amended his complaint to add allegations of defamation, invasion of privacy and breach of an implied agreement of confidentiality. Defendant Scott Calhoun, M.D. has filed a motion for partial summary judgment contending that the plaintiff was not defamed because the statements he made, which appeared in the newspaper article, were true; that the plaintiff's privacy was not invaded by Dr. Calhoun's statements or by the tests conducted on the plaintiff's blood for exposure to the HTLV-III antigen; and that,

because the plaintiff waived the physician-patient privilege by filing this lawsuit, he cannot recover for breach of an implied agreement of confidentiality. For the following reasons, the court concludes that the defendant's motion should be granted in part, denied in part and deferred in part.

The plaintiff's claims, other than his cause of action for medical malpractice, are based on the divulgence by Dr. Calhoun of the fact that the plaintiff is a carrier of Acquired Immune Deficiency Syndrome virus,[1] and the publication of his statement. Defendant Calhoun seeks summary judgment on the plaintiff's defamation claim, on the ground that his statement regarding the plaintiff's status as an AIDS carrier is true. As proof, defendant Calhoun has attached to his motion a copy of the plaintiff's laboratory report. The plaintiff fails to respond to the defendant's evidence or to address his truth defense, which is a complete defense to a libel or slander action. 12 Okl. Stat. § 1444.1. *See Miskovsky v. Oklahoma Pub. Co.*, 654 P.2d 587 (Okl. 1982), *cert. denied*, 459 U. S. 923 (1982) (libel action); 12 Okl. Stat. § 1442 ("Slander is a *false* and unprivileged publication . . .) (emphasis added). Accordingly, defendant Calhoun is entitled to summary judgment on the plaintiff's defamation claim.

The plaintiff asserts that his privacy was invaded when unauthorized laboratory tests were conducted on his blood and when Dr. Calhoun publicly made statements regarding the plaintiff's status as a carrier of the AIDs virus. The Oklahoma courts have recognized the

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[1] *The plaintiff does not dispute the accuracy of this fact.*

tort of invasion of privacy as set out in the Restatement (Second) of Torts, *McCormack v. Oklahoma Pub. Co.*, 613 P.2d 737 (Okl. 1980)[2], and have held that one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person. *Munley v. ISC Financial House, Inc.*, 584 P.2d 1336 (Okl. 1978). Restatement (Second) of Torts § 652B.

Defendant Calhoun argues that factors that are considered in determining the existence of an actionable intrusion are the means used to gain access to the alleged private information and the defendant's purpose for obtaining the information. Dr. Calhoun asserts that his knowledge of the plaintiff's carrier status "was the necessary result of the diagnostic procedures and the medical care and treatment of this patient, all of which were for legitimate medical purpose." Defendant Calhoun's Brief, p. 4. He also contends that to prevail on his claim for invasion of privacy based upon unreasonable intrusion, the plaintiff must establish an intentional interference in the solitude or seclusion of his physical being or a prying into his private affairs. Neither has been established here, defendant Calhoun asserts, because he did not order or request the laboratory studies that identified the plaintiff as a carrier of the AIDs virus.

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[2] *In McCormack, the Oklahoma Supreme Court recognized the tort of invasion of privacy in the four categories enumerated in the Restatement (Second) of Torts. Only two are pertinent here, unreasonable intrusion and unreasonable publicity.*

In response, plaintiff contends that the test for exposure to the HTLV-III antigen was unauthorized and without his consent.[3] Consequently, a fact question appears to exist on the issue of whether defendant Calhoun made an intentional, unreasonable intrusion upon the plaintiff by performing an unnecessary and unauthorized test. Summary judgment on the plaintiff's claim for invasion of privacy premised on § 652B of the Restatement (Second) of Torts, intrusion upon seclusion, is, therefore, denied.[4]

The plaintiff also asserts that his privacy was invaded under § 652D of the Restatement (Second) of Torts, which provides:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> > (a) would be highly offensive to a reasonable person, and

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[3] *The court would note that neither party submitted any evidence on this issue.*

[4] *It is unclear whether plaintiff is actually asserting a claim for unreasonable intrusion or simply one for unreasonable publicity, as he states in his brief that his objection is the "subsequent misuse of such confidential information by the defendant Calhoun through its disclosure to the public via The Daily Oklahoman newspaper". Plaintiff's brief, p.8. Because of the plaintiff's statement that the blood test was performed without his consent, the court assumes plaintiff intends to pursue his § 652B claim. The court will reconsider its denial of summary judgment on this claim if it determines that the statements were privileged.*

(b) is not of legitimate concern to the public.[5]

Unquestionably, the statements plaintiff complains of were made public and generally would be offensive to a reasonable person. However, the court has not been convinced that the divulged facts were private, were not of public record, and were not of legitimate public concern. The parties' briefs do not adequately address these issues. The briefs also do not discuss the possibility that the defendant's statements may have been protected by a conditional privilege. See Restatement (Second) of Torts §§ 652G, 594. The plaintiff and defendant Calhoun are directed to supplement their briefs on these points within twenty (20) days.[6]

The remaining claim of the plaintiff on which defendant Calhoun seeks summary judgment, is his cause of action for breach of an "implied agreement of confidentiality". Defendant Calhoun contends that he did not breach the confidential physician-patient relationship because the plaintiff, by commencing this lawsuit, waived the physician-patient privilege under 76 Okl. Stat. § 19. The defendant relies exclusively on the statutory language in support of his argument and fails to cite any

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[5] *To state a cause of action for invasion of privacy by publicity being given to a party's private life, it is not necessary that the statements be false.* McCormack v. Oklahoma Pub. Co., *613 P.2d 737 (Okl. 1980).*

[6] *Plaintiff asserts that the issues of public interest are limited to the allegations he has made in his complaint. This position ignores the fact that the plaintiff's status as a carrier of the AIDS virus may have been a partial defense to the plaintiff's malpractice claim, which has been dismissed.*

other authority. While the court does not concur with the plaintiff's very limited interpretation of 76 Okl. Stat § 19B, that any waiver by the plaintiff is limited to statements made in a hearing or a court sanctioned proceeding, it concludes that neither party has adequately addressed this issue. They both are directed to supplement their briefs within twenty days on the question of to what extent did the plaintiff, by the commencement of this action, waive the doctor-patient privilege.

IT IS SO ORDERED this 16th day of February, 1989.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT WAYNE LEE,	)	
Plaintiff,	)	No. CIV-88-354-T
vs.	)	(Filed Jun. 27, 1989)
DR. SCOTT CALHOON,	)	
Defendant.	)	

ORDER

Plaintiff Robert Wayne Lee instituted this action against Dr. Scott Calhoon seeking to recover for alleged medical negligence arising out of emergency surgery performed on the plaintiff.[1] Subsequent to the publication of a newspaper article in The Daily Oklahoman, which contained statements made by defendant Calhoon about the plaintiff's medical malpractice suit, the plaintiff amended his complaint to add claims for defamation, invasion of privacy and breach of an implied agreement of confidentiality. Defendant Calhoon filed a motion for partial summary judgment contending that the plaintiff was not defamed because the remarks he made, which appeared in the newspaper article, were true; that the plaintiff's privacy was not invaded by his statements or by the tests conducted on the plaintiff's blood for exposure to the HTLV-III antigen; and that, because the plaintiff waived the physician-patient privilege by filing this lawsuit, he cannot recover for breach of an implied agreement of an

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[1] Plaintiff originally asserted claims against other defendants, but they, together with the plaintiff's medical malpractice claim, have been dismissed with prejudice.

confidentiality. The plaintiff subsequently moved for partial summary judgment on his defamation, invasion of privacy and breach of confidentiality claims. The court granted summary judgment in favor of defendant Calhoon on the defamation claim and, principally because of the absence of any evidence provided by the parties, denied both parties' motion insofar as they pertained to the plaintiff's invasion of privacy claim premised on § 652B of the Restatement (Second) of Torts (intrusion upon seclusion). Rulings on the plaintiff's remaining claims for invasion of privacy under § 652D of the Restatement (Second) of Torts and for breach of an implied agreement of confidentiality were deferred pending receipt of supplemental briefs. Having reviewed the parties' additional briefs, the court concludes that defendant Calhoon is entitled to judgment on the plaintiffs' § 652D and breach of privilege claims,[2] for reasons stated subsequent to a brief summary of the undisputed facts.

The plaintiff was examined at the Baptist Medical Center emergency room by defendant Calhoon, where he was diagnosed as having acute appendicitis. He underwent surgery for an appendectomy, but discovered after awaking from the operation, that a colostomy had been performed. The plaintiff instituted suit alleging that the defendant misdiagnosed his condition and failed to obtain his consent for the unnecessary surgical procedure performed. A reporter then contacted defendant Calhoon

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[2] The court's decision with respect to these two claims will not be final and may be modified, depending upon the proof which the parties submit in accordance with the court's subsequent directive.

regarding the litigation. The defendant told the newspaper reporter that he had not known before the operation that the plaintiff was an AIDS carrier and, thus, was confronted during the surgery with a medical condition different from what he had anticipated. The possibility of causes for the plaintiff's condition, other than appendicitis, would have been considered, defendant Calhoon stated, if he had known that the plaintiff was infected with AIDS. These statements were reported in a newspaper article that was published in The Daily Oklahoman, and form the basis for the plaintiff's invasion of privacy and breach of confidentiality claims.

The plaintiff's invasion of privacy claim is based on § 652D of the Restatement (Second) of Torts, which provides:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> > (a) would be highly offensive to a reasonable person, and
> >
> > (b) is not of legitimate concern to the public.

The elements of a § 652D privacy claim are a public disclosure, that would be offensive to a reasonable person, of private facts that are not of legitimate public concern. *McCormack v. Oklahoma Publishing Co.*, 613 P.2d 737 (Okl. 1980). It cannot be disputed that defendant Calhoon publicly disclosed a personal matter, and the court previously concluded in its March 16, 1989 order, that the statements would be offensive to a reasonable person. Therefore, the issues to be determined are

whether the defendant's divulgence was of legitimate concern to the public or was privileged.

Defendant maintains that the plaintiff made his physical condition a matter of public record and interest by filing his lawsuit, citing comment f to § 652D, which provides:

> f. Involuntary public figures. There are other individuals who have not sought publicity or consented to it, but through their own conduct or otherwise have become a legitimate subject of public interest. They have, in other words, become 'news' . . . The same is true as to those who . . . are involved in judicial proceedings or other events that attract public attention. These persons are regarded as properly subject to the public interest, and publishers are permitted to satisfy the curiosity of the public as to its heroes, leaders, villains and victims, and those who are closely associated with them. As in the case of the voluntary public figure, the authorized publicity is not limited to the event that itself arouses the public interest, and to some reasonable extent includes publicity given to facts about the individual that would otherwise be purely private.

The court concurs with the defendant, concluding that the plaintiff became an involuntary public figure by the institution of the action. Whether because of the size of the prayer for relief – $38,000,000.00 – or because of the nature of his claim – malpractice – the litigation attracted the attention of the news media. However, the mere fact that the press was interested, does not alone make the plaintiff a public figure. He, because of his lawsuit, must have become a "legitimate subject of public interest." The

court interprets this phase as a requirement that the plaintiff's lawsuit be a newsworthy topic.[3] That condition is satisfied because of the public interest or debate regarding the size of litigation claims and jury awards (often referred to as the insurance liability crisis or tort reform), and the public concern in policing failures in the medical profession. See *Gilbert v. Medical Economics Co.*, 665 F.2d 305 (10th Cir. 1981).

The mere fact that the plaintiff's action is of legitimate public concern does not, however, protect the defendant's statements. They still will be actionable if they do not have "some substantial relevance to a matter of legitimate public interest." Id at 308. Restatement (Second) of Torts, comment f ("and to some *reasonable extent* includes publicity given to facts about the individual that would otherwise be purely private.") (emphasis added) Some private facts about a public figure may lie outside the protected sphere of legitimate public interest. *Gilbert v. Medical Economics Co.*, 665 F.2d at 308. The defendant's comments, though, apparently pertained to his defense of the lawsuit[4] and, thus, the court determines they were sufficiently related to the news story to preclude them

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[3] Not all matters are of legitimate public interest. "The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake with which a reasonable member of the public with decent standards, would say that he had no concern." Restatement (Second) of Torts § 652D, comment h.

[4] Defendant Calhoon is directed to provide evidence of this fact, not bald statements in a brief, within five (5) days. Plaintiff is granted ten (10) days therefrom to submit any contrary evidence.

from serving as the basis for an invasion of privacy claim. See *Sipple v. The Chronicle Publishing Co.*, 154 Cal. App.3d 1040 (Cal. Ct. App. 1984) (newspaper articles' reference to the plaintiff's homosexuality did not constitute an invasion of privacy because the fact was newsworthy or of legitimate public interest). See generally *Glenn v. Kerlin*, 248 So.2d 834 (La.Ct.App. 1971) (Plaintiff failed to state a cause of action for invasion of privacy against his doctor, for conferring with defense attorneys because, by filing a suit to recover for personal injuries, he made a legal issue of his physical condition).

Even if the court had found that the plaintiff was not an involuntary public figure and his lawsuit not a legitimate subject of public interest, to the extent the defendant has been accused of invading the plaintiff's privacy, his statements are conditionally privileged. Section 652G of the Restatement (Second) of Torts makes certain conditional privileges applicable to the publication of any matter that is an invasion of privacy. Among them is the privilege to protect the publisher's interest, which is found in § 594. That section provides:

> An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that
>
> > (a) there is information that affects a sufficiently important interest of the publisher, and
> >
> > (b) the recipient's knowledge of the defamatory matter will be of service in the lawful protection of the interest.

The conditional privilege will shield the defendant from liability for his statements if the privilege is not

abused. Restatement (Second) of Torts, § 593. It exists, under circumstances such as those present in this case, where the person making the publication reasonably believes "that his interest in his own reputation has been unlawfully invaded by another person and that the defamatory matter that he publishes about the other is reasonably necessary to defend himself." Comment k to § 594. Warren and Brandeis, The Right to Privacy, 4 Harv. L.Rev. 213, 217 (1890). Although the privilege may be lost through abuse, see §§ 599-605A. no evidence regarding abuse, has been presented to the court.[5] Therefore, under

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[5] See notes 2 and 4, supra. The court does not find the defendant's failure to report the plaintiff's test results to the Oklahoma State Department of Health as probative of his intent in disclosing the plaintiff's condition to the press. The court would also note, that with respect to the loss of a privilege through abuse, comment a to § 603 states that "if the publication is made for the purpose of protecting the interest in question, the fact that the publication is inspired in part by resentment or indignation at the supposed misconduct of the person defamed does not constitute an abuse of the privilege." See generally W. Prosser and W. Keaton, The Law of Torts, § 115 at 834 (5th Ed. 1984) (although the following comment pertains to qualified privileges to defamation claims, the Restatement (Second) of Torts has made such privileges applicable to invasion of privacy claims). ("[I]t is the better and perhaps more generally accepted view that the mere existence of such ill will does not necessarily defeat the privilege. If the privilege is otherwise established by the occasion and a proper purpose, the addition of the fact that the defendant feels indignation and resentment toward the plaintiff and enjoys defaming him will not always forfeit it . . . [T]he court will look to the primary motive or purpose by which the defendant apparently is inspired."

§ 652G, the defendant's statements made in defense of his professional interest, are privileged.

Having found both that the plaintiff is an involuntary public figure and the defendant's statements pertaining to him were newsworthy, and that the defendant's comments were conditionally privileged, the court concludes that the defendant is entitled to summary judgment on the plaintiff's § 652D invasion of privacy claim.

Plaintiff's remaining claim is for breach of an "implied agreement of confidentiality". Defendant Calhoon contends that he did not commit a breach of confidentiality, because the plaintiff, by commencing this lawsuit, waived the physician-patient privilege under 76 Okl. Stat. § 19. That statute provides as follows:

> Access to medical records – Copies – Waiver of privilege.
>
> *In cases involving a claim for personal injury* or death *against any practitioner of the healing arts or a licensed hospital, arising out of patient care, where any person has placed his physical or mental condition in issue by the commencement of any action,* proceeding or suit *for damages,* or where any person has placed in issue the physical or mental condition of any other person or deceased person by or through whom such person rightfully claims, *he shall be deemed to waive any privilege granted by law concerning any communication made to a physician or health care provider with reference to any physical or mental condition or any knowledge obtained by such physician or health care provider by personal examination of any such*

> *patient;* provided that, before any such communication, medical or hospital record or testimony is admitted in evidence in any proceeding it must be material and relevant to an issue therein, according to existing rules of evidence. (emphasis added).

The court previously rejected the plaintiff's argument that any waiver resulting from his institution of litigation was limited by the statute to statements made in a hearing or a court sanctioned proceeding. At least one other court, construing a similar waiver provision, has reached the same conclusion, stating that "[t]he statute should not be interpreted so narrowly that it encompasses only situations involving formal court proceedings." *Moses v. McWilliams,* 549 A.2d 950, 955 (Pa. Super. Ct. 1988).

Plaintiff's contention that his position is supported by the confidentiality requirements imposed by 43A Okl. Stat. § 1-109 and 63 Okl. Stat. § 1-502.2 is similarly unpersuasive because those statutes are inapplicable. Section 1-109(A) of Title 43A is a provision of the Mental Health Law, 43A Okl. Stat. §§ 1-101, et seq., whose purpose is "to provide for the humane care and treatment of persons who are mentally ill or who require treatment for drug or alcohol abuse." Even if the Act pertained to this case, which it clearly does not, its confidentiality requirements are not effective when 76 Okl. Stat. § 19 is applicable: "Except as provided in this section and Section 19 of Title 76 of the Oklahoma Statutes, . . . " 43A Okl. Stat. § 1-109(A). A similar exemption from the confidentiality limitations imposed by the Oklahoma Public Health Code is found in 63 Okl. Stat. § 1-502.2(A): "[u]nless otherwise provided by law . . . " Section 19 of Title 76, Oklahoma

Statutes, provides "otherwise" and is controlling in this case.

Even if it is assumed that some waiver occurred, plaintiff basically argues that because there was no mention in the original complaint of the test for HTLV-III and because the alleged negligent acts did not concern the test, defendant Calhoon improperly disclosed to the public the test results. Plaintiff asserts that the waiver in § 19(B) was enacted to enable a physician to divulge confidential information he had about the physical or mental condition of his patient to prepare his defense and that any waiver of the physician-patient privilege is limited to the allegations in the complaint. While the court would concur that disclosure of confidential medical information that was *not relevant* to the medical malpractice suit might be actionable, the disclosures made by the defendant apparently pertained to his defense of the lawsuit.[6]

The court does not find that the statute limits the waiver to the extent that a physician should be precluded from revealing information relevant to his defense when questioned about malpractice claims asserted against him. The statute is broadly worded – "*any* privilege . . . concerning *any* communication . . . with reference to *any* physical or mental condition." Of significance to the

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[6] See notes 2 and 4, supra. Although the plaintiff has, by statements in his brief rather than by offering proof, challenged the defendant's motive in making the statements, he has only vaguely asserted that the remarks were not relevant or pertinent to the defense. Plaintiff's Supplemental Brief, pp. 4, 9-10.

court's decision is the fact that the reporter contacted the defendant. A different conclusion might have been reached if the defendant had, on his own, initiated the news conference. To restrict the waiver, as the plaintiff urges, under the facts of this case, might even impinge on the defendant's constitutional rights.[7]

Therefore, although the court does not intend by its decision to vindicate the defendant's statements or condone his behavior, it concludes that the plaintiff by filing his lawsuit, waived the physician-patient privilege to the extent of any communications material to the litigation (either the plaintiff's claims or the defendant's defenses), thus precluding him from recovering for breach of an implied agreement of confidentiality. See generally *Fedell v. Wierzbieniec*, 485 N.Y.S.2d 460 (N.Y. Sup. Ct. 1985) (no cause of action existed for breach of confidence based on doctor's revealing of communications between himself and patient/plaintiff to a defendant in a personal injury action without the plaintiff's consent, since the plaintiff waived the privilege by commencing a lawsuit that put his physical and mental condition in issue).[8] The defendant is entitled to judgment on this claim also.

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[7] Because of the court's decision, it is not necessary to reach the constitutional issue.

[8] Additional support for the court's decision is found in 12 Okl. Stat. § 1443.1, which provides that certain communications are privileged and thus not actionable as libel, including: "[a]ny and all expressions of opinion in regard [to a judicial proceeding], and criticisms thereon. . . If false statements are protected, true comments also should be shielded.

Finally, the court previously denied defendant Calhoon's motion as it related to the plaintiff's invasion of privacy claim premised on § 652B of the Restatement (Second) of Torts (intrusion upon seclusion.) Defendant Calhoon apparently seeks reconsideration of the ruling, as he has submitted an affidavit in which he attests that he did not order the laboratory studies that identified the plaintiff as a carrier of the AIDS virus. His position is that he cannot be found liable under § 652B because the tort requires an intentional intrusion, Restatement (Second) of Torts § 652B; *Werner v. Kliewer,* 710 P.2d 1250 (Kan. 1985), and he neither ordered nor performed the tests. The plaintiff responds by submitting evidence which he asserts refutes defendant Calhoon's affidavit: a record from the Oklahoma Teaching Hospitals Laboratories regarding the "T-Cell Subsets" and a hepatitis profile which the plaintiff contends reflects that the defendant was the requesting physician.

The fact that the defendant may have ordered a test for hepatitis does not establish that he ordered the AIDS blood tests. The court cannot tell from plaintiff's Exhibit "B" whether the "T-Cell Subsets" document reflects the results of an AIDS test or another test. The plaintiff is directed to submit this information within fifteen (15) days, together with any other evidence he has which establishes that the defendant ordered the AIDS tests.

The court does not concur with the plaintiff's apparent position, not supported by any authority, that the defendant's liability for invading the plaintiff's privacy may be predicated on the fact that the plaintiff was under the defendant's care and supervision, regardless of whether or not the defendant ordered the AIDS tests or

knew that they had been ordered and approved or ratified such. The court will await plaintiff's response to determine whether it should reconsider its decision that the plaintiff's § 652B invasion of privacy claim should be submitted to a jury.

Accordingly, a final decision on the pending summary judgment motions will be made upon the court's receipt and review of any evidence the parties submit.

IT IS SO ORDERED this 27th day of June, 1989.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT WAYNE LEE, Plaintiff, vs. BAPTIST MEDICAL CENTER OF OKLAHOMA, INC., DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; and BAPTIST MEDICAL PLAZA ASSOCIATES, LTD., Defendants.	)	NO. CIV-88-354-T (Filed Jul. 24, 1989)

ORDER

Plaintiff Robert Wayne Lee has filed an application seeking an extension of time within which to submit additional evidence pursuant to the court's June 27, 1989 order and permission to conduct further discovery. The court concurs with the defendant's analysis of the plaintiff's application that it appears to be limited to the plaintiff's claim arising under § 652B of the Restatement (Second) of Torts. The court further agrees with the defendant that the only issue raised by the plaintiff's § 652B invasion of privacy claim is whether defendant Calhoon ordered that an AIDS test be performed on the plaintiff. Consequently, most of the statements made by the plaintiff in paragraphs 5 through 8 of his application are totally irrelevant.

The court reluctantly concludes that the plaintiff should be permitted, within the next thirty (30) days, to conduct additional discovery limited to the question of whether defendant Calhoon ordered the AIDS tests or knew that they had been ordered and approved or ratified such. Any additional evidence which the plaintiff wishes to submit must be filed within five (5) days after the conclusion of the thirty (30) day period. At that time plaintiff also should submit any information he possesses which is responsive to the court's directive on page 11 of the June 27, 1989 order.

Because the plaintiff has not submitted any evidence in support of his § 652D of the Restatement (Second) of Torts invasion of privacy claim or his breach of confidentiality claim, to refute the evidence submitted by the defendant, the court's decisions with respect to these two claims are now final. A decision on the only remaining claim, that for invasion of privacy under § 652B, will be made subsequent to the receipt of any additional evidence from the plaintiff.

IT IS SO ORDERED this 24th day of July, 1989.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT WAYNE LEE, Plaintiff, vs. BAPTIST MEDICAL CENTER OF OKLAHOMA, INC., DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; and BAPTIST MEDICAL PLAZA ASSOCIATES, LTD., Defendant.	)	NO. CIV-88-354-T (Filed Dec. 12, 1989)

ORDER

Plaintiff Robert Wayne Lee instituted this action against Dr. Scott Calhoon seeking to recover for alleged medical negligence arising out of emergency surgery performed on the plaintiff. The plaintiff subsequently amended his complaint to add claims for defamation, invasion of privacy and breach of an implied agreement of confidentiality. Both parties filed motions for summary judgment and summary judgment was granted in favor of defendant Calhoon on the defamation claim, the plaintiff's invasion of privacy claim under § 652D of the Restatement (Second) of Torts and his claim for breach of an implied agreement of confidentiality. With respect to the plaintiff's invasion of privacy claim premised on § 652B of the Restatement (Second) of Torts (intrusion

upon seclusion), the plaintiff was directed to explain the significance of plaintiff's exhibit "B" and submit any other evidence to support his claim that defendant Calhoon ordered the AIDS test.

The plaintiff has filed his supplemental response and, in addition to failing to explain his exhibit "B", has failed to submit sufficient proof to controvert the evidence submitted by the defendant that he did not order or authorize either of the two AIDS tests. To the contrary, the only credible evidence establishes that the initial test was ordered by Dr. Crook and the subsequent test was automatically requested by Baptist Medical Center's blood bank due to the results of the HTLV-III test.

Accordingly, Dr. Scott Calhoon's motion for summary judgment on the plaintiff's § 652B claim is granted.

IT IS SO ORDERED this 12th day of December, 1989.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT WAYNE LEE, Plaintiff, vs. BAPTIST MEDICAL CENTER OF OKLAHOMA, INC., DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; and BAPTIST MEDICAL PLAZA ASSOCIATES, LTD., Defendant.	)	NO. CIV-88-354-T (Filed Jul. 24, 1989)

JUDGMENT.

In accordance with the orders entered these dates, December 12, 1989, July 24, 1989 and June 27, 1989, judgment is entered in favor of the defendant Dr. Scott Calhoon and against the plaintiff Robert Wayne Lee.

IT IS SO ORDERED this 12th day of December, 1989.

/s/ Ralph G. Thompson
UNITED STATES
DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 12-12-89

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ROBERT WAYNE LEE,
Plaintiff – Appellant,
v.
DR. SCOTT CALHOUN,
Defendant – Appellee,
and
SCOTT W. CALHOUN, M.D., INC.,
Defendant.

No. 90-6013

(Filed January 16, 1992)

ORDER

Before MCKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA BALDOCK, BRORBY, EBEL, Circuit Judges, Brown, Senior District Judge.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court
/s/ Robert L. Hoecker
ROBERT L. HOECKER, Clerk

Supreme Court, U.S.
FILED
JUN 2 1992

(3)

No. 91-1650

In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE LEE,

Petitioner,

vs.

BAPTIST MEDICAL CENTER OF OKLAHOMA, WC; DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; AND BAPTIST MEDICAL PLAZA ASSOCIATES, LED.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

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May, 1992

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No. 91-1650

In The

Supreme Court of the United States

October Term, 1991

ROBERT WAYNE LEE,

Petitioner,

vs.

BAPTIST MEDICAL CENTER OF OKLAHOMA, WC; DR. SCOTT CALHOON; OKLAHOMA HEALTHCARE CORPORATION; AND BAPTIST MEDICAL PLAZA ASSOCIATES, LED.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY TO BRIEF IN OPPOSITION

OPINIONS BELOW

The United States Court of Appeals for the Tenth Circuit issued its opinion (No. 90-6013) on November 6, 1991 and denied petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc on January 16, 1991. The Appeal was from a number of orders by the Trial Court and Judgment was entered in favor of respondent of December 12, 1989, by the Honorable Ralph G.

Thompson, United States District Judge for the Western District of Oklahoma.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is made pursuant to Rule 24.1 and Rule 24.4 and made in reply to numerous inaccuracies and omissions in the Respondents' Statement of the Case. Respondents assert in their Statement of the Case that the Petitioner has failed to present with accuracy, brevity, and clearness whatever is essential to a speedy and adequate understanding of the points requiring consideration. Petitioner submits that his original Statement of the Case provides an accurate and clear description of all that is essential for a ready and adequate understanding of the points requiring consideration.

Respondents assert in their Statement of the Case that there was no evidence of an "unauthorized disclosure" based on "Malicious" [sic] and "self interest". In fact, there is evidence that the disclosure of Petitioner's medical condition to the media was unauthorized (Affidavit of Robert Wayne Lee). The petitioner filed said affidavit in response to Respondents' Motion for Summary Judgment. There has been no evidence ever presented that the Petitioner consented to and authorized Dr. Calhoon to make statements regarding his medical condition to the media.

Respondents continually assert that Dr. Calhoon was only attempting to explain the medical facts pertinent to his defense of this lawsuit in informing the media that

petitioner had AIDS. Petitioner has and continues to assert that the information released by Dr. Calhoon was not relevant to the medical malpractice action and this is supported by the District Court's Order dated June 27, 1989, as only "apparently pertaining" to the action. The medical records did not indicate a connection between the colostomy surgery and petitioner's condition of being exposed to the HIV virus. Further, the answers filed by the Respondents do not allege *any* connection between the necessity of the surgery and the Petitioner's having AIDS.

Secondly, the Respondents assert that there is no evidence that any of the defendants withheld medical records. This is clearly erroneous. The Petitioner and his counsel both repeatedly made attempts to obtain the complete medical records and were denied this request. A Motion for Immediate Production of Documents was filed before the District Court. Finally, after the filing of the lawsuit, petitioner was graciously provided with his medical records.

Further, respondents allege that there was a connection between the medical care of petitioner and AIDS. This is inaccurate. In his own deposition, Dr. Calhoon stated that he did not learn that the petitioner was an AIDS carrier until two days after the surgery. (Deposition of Dr. Calhoon). It is beyond the stretch of the imagination to see how respondents can maintain the position that the comments made to the reporter could be concerned with the operation performed when he performed all the care without knowledge of the condition.

The petitioner's original Statement of the Case coupled with the showing of these inaccuracies of the Respondents' Statement of the Case represent a clear, concise, and accurate representation of all that is essential for this Court to make a ready and adequate understanding of the points requiring consideration in accordance with Rule 14.5 of the Rules of the Supreme Court.

ARGUMENT

PETITIONER'S RIGHT OF PRIVACY UNDER THE UNITED STATES CONSTITUTION IN SEEKING DAMAGES FOR DISCLOSURE OF HIS HIV CONDITION OUTWEIGHS THE FIRST AMENDMENT'S RIGHT OF ACCESS TO COURT PROCEEDINGS.

Petitioner respectively submits to this Final Court the following in hopes that it will not fall on deaf ears, the relief sought is not for vindication of this Petitioner, it is for protection of every citizen henceforth, and a resounding reformation of what the Bill of Rights is supposed to stand for.

1. Fact: The Petitioner never consented to have an HIV test run.

2. Fact: The Petitioner so swore to in an affidavit filed in the case herein.

3. Fact: The Respondent, Dr. Scott Calhoon, was the treating physician at all times pertinent herein.

4. Fact: The Respondent, Dr. Scott Calhoon's name appears on the request for an HIV test and only his name.

5. Fact: The Respondent, Dr. Scott Calhoon, has never produced any consent form authorizing the unauthorized intrusion into the petitioner's body by extracting blood and sending it to a state lab for an HIV test.

6. Fact: The Respondent, Dr. Scott Calhoon, having been sued for malpractice, totally unrelated to the unauthorized HIV testing, knew or should have known that no authorization had ever been obtained for such a test and his public disclosure to the press the day he was served with a summons can in no way be protected by a disclosure statute of the State of Oklahoma or the First Amendment to the United States Constitution.

Unless this Court, the Final Tribunal to which the Petitioner will ever be able to voice this injustice accepts certiorari there will be "a chilling effect" upon access to all courts. All people, not only people who have tested positive for HIV, would fear the halls of justice, afraid that the defendant in retaliation for being sued would disclose irrelevant medical history that would devastate them and their loved ones. In the present case, the defendant was a licensed medical Doctor and presumably knew about the laws governing physician-patient confidentiality. The complaint that he was served with, and which he responded to, the day after being served, made no mention of AIDS or HIV. The Respondents assert arguments about burden of proof and a state statute, which is totally inapplicable in this case, to mislead this Court as to the real issue which is the Constitutional right to privacy.

The denial of a person's right to privacy deprives them of one of the most fundamental rights of the Constitution. The right of privacy is granted in the concept of personal liberty embodied in the Fourteenth Amendment, having roots in the First, Fourth, Fifth, and Ninth Amendments. *Doe v. Shady Grove Hospital,* 598 A.2d 507, 512 (Md. App. 1991) quoting *Roe v. Wade,* 410 U.S. 113, 152-153 (1973). The facts in *Doe v. Shady Grove Hospital,* 598 A.2d 507 (Md. App. 1991) are almost exactly the same as in the present case. In *Doe,* the appellant was diagnosed as having AIDS while being treated for pneumonia. The appellant informed other people, including members of his family, of his AIDS diagnosis. The patient never authorized such disclosure. The Maryland Appellate Court held that this unauthorized disclosure made out a patent violation of the Right to Privacy. *Id.,* at 512. The Court went on to further state that the dissemination of the patient's name in the media would result in even a greater violation of the person's privacy than would occur by simply telling one's family. *Id.* The protection of one's privacy is a sufficiently compelling governmental interest to support limiting the public's right of access to medical information. *Id.*

The application of the principles set forth in *Doe,* shows that the interest in one's privacy outweighs the public's and Dr. Calhoon's interest. The Tenth Circuit held that Dr. Calhoon's interest in protecting his good name and reputation is compelling. Obviously, there is enough conflict among the Circuits to warrant examination by this Court.

In *Doe,* the Court addressed the fear that this Petitioner has repeatedly asserted. This Court held that to

allow disclosure would have the effect of making potential Plaintiffs, who believe their rights were violated, loath to bring their complaints to court as the end result will be further and ever more widespread violation of their "protected" rights. *Id.* at 513. It is certainly clear that this is exactly what happened in the instant case. Mr. Lee filed a petition for medical malpractice based upon unnecessary, unauthorized surgery. What resulted was a violation of his right to privacy.

In Respondents' Brief in Opposition, Respondents assert that Petitioner has not shown any indication of an invasion of this right to privacy, and that this effect upon Petitioner's life is not a fact for consideration. The arguments above certainly show that Petitioner's right to privacy has been violated, and has been supported recently in the Courts of this land. *See Doe v. Shady Grove Hospital,* supra; *Nolley v. County of Erie,* 776 F. Supp. 715 (W.D.N.Y. 1991). Respondent asserts that the public policy supporting the physician-patient privilege is not thwarted by discussion of one's medical condition with the media. It is beyond logic how Respondent can present this argument to this Court as being more compelling than the Constitutional Right to Privacy. It is the prevailing view among AIDS experts that a person who has AIDS desires to keep this information as quiet as possible, sharing it only with those people whose support can be counted on. *Doe,* 598 A.2d at 516. This most certainly does not mean allowing a doctor to tell the world at large, as done in this case. In *Woods v. White,* 689 F. Supp. at 876, the court held that it is difficult to imagine that information about having AIDS is not information of the most personal kind, or that an individual would not have an

interest in protecting the dissemination of such information. *Id.*

As to Respondents' contention that there are no facts to support Petitioner's argument that he has been forced to change his job, name and residence, Petitioner asserts that there is a great deal of existing argument for support of damages. In *Doe v. Shady Grove Hospital*, 598 A.2d 507 (Md. App. 1991), the Court held that the revelation of one's name to the public-at-large, coupled with the diagnosis of AIDS, could place the person's livelihood in jeopardy. *Id.* at 515. Everyone this person meets would know of this condition. *Id.* In the instant case, Petitioner's life, livelihood, and pursuit of happiness has certainly been jeopardized. Dr. Calhoon's dissemination of the Petitioner's name and condition has drastically changed Mr. Lee's life.

CONCLUSION

Petitioner has been deprived of one of the Constitution's most fundamental rights: the right to privacy. As there is more than adequate case law and public policy to conflict with the Tenth Circuit's decision, Petitioner submits that there is a foundation for review by this Court and prays that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DIANNA S. WISDOM
(Counsel of Record)
3120 Northwest 23rd Street
Oklahoma City, Oklahoma 73107
(405) 528-1888

APPENDIX

Exhibit "B"

AFFIDAVIT

STATE OF FLORIDA)
)
COUNTY OF ORANGE) SS:

I, Robert Wayne Lee, being first duly sworn, allege and state, I am of lawful age, and under oath, do hereby swear or affirm:

1. I am the plaintiff in the case of Robert Wayne Lee, plaintiff vs. Baptist Medical Center of Oklahoma, and Scott Calhoon, M.D., defendants, said case being filed in the United States District Court for the Western District of Oklahoma, and bearing the number of CIV-88-354-T.

2. I affirmatively state that I never gave defendant Scott Calhoon, M.D., or anyone associated with defendant Calhoon or anyone associated with defendant, Baptist Medical Center, or anyone *period*, the consent nor the authorization to perform and/or test myself for exposure to the HTLV-III antigen (AIDS TEST) at anytime either before, during or after admittance to the Baptist Medial Center, Oklahoma for the procedures which are the basis of this lawsuit.

3. I affirmatively state that I had no reason to suspect my exposure to the HTLV-III antigen and had long since limited my activities so as to limit the possibility of exposure to the HTLV-IIi antigen and under the circumstances I would not have felt the need for such a test nor

consented to it, and under the circumstances the performance of the unauthorized test was an intentional interference with my own solitude and piece of mind.

4. I affirmatively state that the act of testing my blood without consent was an unauthorized prying into my private affairs by the fact that the results were made a matter of public record for the entire world to see.

5. I affirmatively state that I was never asked nor told that any type of test was going to be performed to determine my exposure to the HTLV-III antigen (AIDS TEST) while under the care of defendant, Calhoon, while at the Baptist Medical Center, Oklahoma.

6. Since no authorization was obtained it is my understanding that the test was not performed until the day after surgery and it was only upon my direct inquiry as to why I was placed in isolation that I become aware that any type of AIDS test had been performed on myself and also informed of the results of that test.

7. I affirmatively state that I was unaware that the taking of the unauthorized AIDS test would in any way be connected to the alleged medical malpractice lawsuit I filed until 10/31/88 when at my deposition Glen Huff, counsel for Baptist Hospital, made such an allegation. I in no way intentionally intended to waive the physician/patient privilege by the filing of the lawsuit for medical malpractice.

Further Affiant Sayeth Not.

/s/ Robert Wayne Lee
Robert Wayne Lee

Subscribed and sworn to before me this 3rd day of April, 1989.

/s/ Helen Marino
Notary Public

My Commission Expires:
NOTARY PUBLIC STATE OF
FLORIDA AT LARGE
MY COMMISSION EXPIRES
APR 22 1990

OKLAHOMA TEACHING HOSPITALS LABORATORIES

T-CELL SUBSETS

PATIENT INFORMATION:
NAME: LEE, Robert W.
MRNO: – 5011130871 BDATE: 38 y.o.
SEX: M LOCATION: Baptist Hospital CALHOON, S

SPECIMEN INFORMATION:
SPECIMEN: Whole Blood ACC#: 87FC4313
DATE COLLECTED: 5-5-87 RECEIVED: 5-6-87
PHYSICIAN: CALHOOM [SIC] PERFORMED: 5-6-87

INSTRUMENT INFORMATION:
SPECTRUM III/SYSTEM 50:III TECH ID: NW
PMT Gains: F.W. Scatter 48 Rt Scatter 280
GRN. Fluro. 650

RESULTS:

White Blood Cell Differential: Total WBC 8600 counts/ul
Lymphocytes 25.6% Monocytes 9.8% Granulocytes 64.6%

	Results % of Total Lymph.	Normal Range	Cell Count/ul	Mean Channel
Blank				48
(Pan T) OKT3	80.7	(64-78%)	1777	87
(Helper) OKT4	22.1	(35-48%)	487	70
(Suppress) OKT8	52.3	(21-34%)	1151	173
(E Rosette) OKT11	81.0	(73-85%)	1783	75
Ratio T4/T8	0.42	(1.19-2.23)		

SILVAN N GOLDMAN CENTER
OKLAHOMA BLOOD INSTITUTE

Ronald O. Gilcher, MD, F.A.C.P.
Director

1001 N. Lincoln Blvd.
Okla. City, OK. 73104
(405) 232-0670

036 3182
BAR CODE US DISEASE MARKER REQUEST FORM
0363182

OBI NUMBER: _____

PATIENT INFORMATION:
NAME: BMCO 441

SS# or
ID# _____

DIAGNOSIS: _____ AGE: _____ SEX: _____

SEND REPORT TO: _____
NAME AND TITLE

PHONE REPORT 949 6835
TELEPHONE #

HOSPITAL or CLINIC: Baptist

CITY STATE ZIP

ADDRESS: 3300 NW EXPY OKC OK 73112

PLEASE CHECK TEST REQUESTED:

___ HEPATITIS PROFILE
(includes HBsAg, Anti-HBc, Anti-HBs, Anti-HAV Ant-CIV, ALT)

		RESULT
_____	HBsAg	_____
_____	Anti-HBc	_____
_____	Anti-HBc IgM	_____
_____	Anti-HBs	_____
_____	Anti-HBeAg	_____
_____	Anti-HBe	_____

		RESULT
_____	Anti-HAV	_____
_____	Anti-HAV IgM	_____
_____	Anti-CNV	_____
_____	ALT	_____IU/L
X	Anti-HTLV-III	positive 8=18
_____	RPR	_____
	Western blot	positive p55
		p24, p32, p18

INTERPRETATION AND COMMENTS:

The concensus at the July 31, 1985 CDC-sponsored meeting on Anti-HIV (HTLV-III) testing at the NIH on the interpretation of Anti-HIV (HTLV-III) test results is as follows:

If the ratio of the optical density reading of the patient's sample to the cut-off value is:

≤ 2.0: Probably false positive
Repeat testing recommended in 2-3 months.

> 2.0 ≤ 7.0. Results are not conclusive
Repeat testing recommended in 2-3 months.

> 7.0:	Consider true positive (Western Blot testing is recommended for all positives).

(OBI USE ONLY) DATE AND TIME SAMPLE RECEIVED: 5/5/87 0100 TECH: 15

REPORTED BY PHONE: _____ TO: _____ TECH: _____

DATE MAILED: MAY 15 1987 CATEGORY: _____

NAME OR I.D. 0363182

State Lab No.
5963

DATE OF BIRTH ___ SEX ___
RACE ___

Date Received
5/6/87

DATE COLLECTED 5-3-87

TYPE OF SPECIMEN
X Serum _ Plasma

HTLV-III Antibody Test

[Human T-cell Lymphotrophic Virus type III]

Test Request: _ ELISA X Western Blot

Has patient been previously tested? _ Yes X No

This form will be returned to you to acknowledge receipt of specimen and its assigned identification number. Test results will be reported by this number only. YOU MUST MAINTAIN a confidential file for cross reference.

SEND REPORT TO:

Sylvan N. Goldman Center
Oklahoma Blood Institute
1001 N. Lincoln Blvd.
Oklahoma City, Ok 73104

Laboratory Service
Oklahoma State Department of Health
1000 NE 10th Street, P.O. Box 24106
Oklahoma City, Oklahoma 73124

ODH Form No. 229

State Lab No.
5963

Date Received
5/6/87

HTLV-III Antibody Test

[Human T-cell Lymphotrophic Virus type III]

Test Request: _ ELISA X Western Blot

Has patient been previously tested? _ Yes X No

MAY 8 1987

SEND REPORT TO:

Sylvan N. Goldman Center
Oklahoma Blood Institute
1001 N. Lincoln Blvd.
Oklahoma City, Ok 73104

TEST RESULTS

HTLV-III ELISA

_ Reactive

_ Nonreactive

WESTERN BLOT

X Antibody Detected

_ Antibody NOT Detected

PSS 3D
41 18
ODH Form No.
229

Laboratory Service
Oklahoma State Department of Health
1000 NE 10th Street, P.O. Box 24106
Oklahoma City, Oklahoma 73124

[p. 25] limited by an order of the court as to the scope of this discovery and I feel that it is our obligation to comply with the order of the court as to the scope of this discovery.

MS. WISDOM: I am trying to determine when responsibility is turned over. If at the time Mr. Lee goes into the emergency room, he is under the control of Baptist employees, that's one thing; then, when a physician-on-call is called in and care is turned over to that physician, it becomes an entirely different amount of responsibility and an entirely different ball game.

MR. HUFF: Why don't I suggest this. Whether than us arguing back and forth about it, perhaps you can ask Mr. Hupfeld if he knows how that responsibility is divided or split up. I have a hunch we're arguing about something that he may well not know.

Q. (By Ms. Wisdom) It's my understanding, Mr. Hupfeld, that you testified previously that the admitting physician had responsibility for the patient, is that not correct?

A. I think the operative word was generally.

Q. Who do you consider to be the admitting physician, the emergency room doctor or the private physician or the physician-on-call?

A. Again, generally, the physician that admits the patient to the hospital is not the emergency room physician.

[p. 26] Q. And at the time that Mr. Lee was admitted to the hospital, what was your understanding of who

was responsible for a patient once they were admitted to the hospital?

MR. PAULL: Object to the form. I'm objecting to the form. Responsible in what way; for his bills, for his medical care, for his surgical care, for his internal medical care, for his radiology care?

Q. (By Ms. Wisdom) who was responsible for his medical care?

MR. HUFF: Can you answer that question in that fashion?

THE WITNESS: Only in the broadest sense.

A. Generally, it's assumed that the attending – and the attending is often the admitting, but not necessarily – he's responsible for the care of the patient.

Q. (By Ms. Wisdom) And at the time that Mr. Lee was admitted to the hospital, what person would have authority to discharge him?

A. Again, that, as has been stated, that represents a myriad of circumstances dependent upon whether the patient was admitted by an internist and was operated on, whether the patient was admitted by a surgeon, was operated on and then turned over to someone else for internal medicine care. The answer is as broad as the circumstances that allow patients [p. 27] to come into this institution. There is no singular answer.

Q. I realize that, Mr. Hupfeld, but generally, when someone comes into your hospital, somebody has to authorize him to come in, correct?

A. Correct.

Q. And generally, that person that authorizes him to come in is the one who discharges him, correct?

A. Generally.

Q. Generally, correct. You don't just put somebody in this hospital and then he just floats around here with nobody watching over him, correct?

MR. HUFF: Counsel, I'm going to object to your sarcasm. This witness is trying to answer as accurately as possible. And although, generally, patients come in the hospital being admitted by one physician and being discharged by that physician, it is a very common practice for that not to occur. Now, you seem to be very sarcastic about the witness trying to point that out to you.

MS. WISDOM: Well, the witness is being cooperative, it's counsel that's trying to split hairs. The general policy is all I'm asking.

MR. HUFF: Generally?

Q. (By Ms. Wisdom) Generally, does not one doctor admit a patient and discharge a patient?

MR. HUFF: If you're talking about generally

* * *